No. 2805

In The

United States

Circuit Court of Appeals

For the Ninth Circuit

MICHAEL GEORGE,

Plaintiff in Error

VS.

MRS. GEORGE MYERS,

Defendant in Error

Brief of Plaintiff in Error

Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1

GUNNISON & ROBERTSON

Attorneys for Plaintiff in Error

SEATTLE, PRINTER, JUNEAU

No. 2805

In The

United States

Circuit Court of Appeals

For the Ninth Circuit

MICHAEL GEORGE,

Plaintiff in Error

VS.

MRS. GEORGE MYERS,

Defendant in Error

Brief of Plaintiff in Error

Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1

GUNNISON & ROBERTSON
Attorneys for Plaintiff in Error

BEATTIE, PRINTER, JUNEAU

STATEMENT OF THE CASE.

This is an action brought by plaintiff (defendant in error) against defendant (plaintiff in error) to recover on two causes of action.

As a first cause of action plaintiff alleges that between October 18, 1909, and December 21, 1911, she, at defendant's special instance and request, performed certain services for defendant; that defendant agreed to pay plaintiff a reasonable compensation for said services; that said services were reasonably worth $390.00; that defendant has not paid any part of said sum except $72.50; and plaintiff asks judgment for $317.50, with interest at 8 per cent per annum from December 21, 1911.

As a second cause of action plaintiff alleges that on October 18, 1909, her husband, George Meyers, and defendant entered into a partnership agreement, whereby they agreed to conduct a general mercantile establishment in Douglas, Alaska; that said George Meyers was then the owner of a store suitable for said business, and agreed and stipulated with defendant to use said store for their partnership business; that in consideration thereof defendant agreed and promised to pay said Meyers, as defendant's portion of the rental of said building, the sum of $15.00 on the 18th day of each month

during the continuation of said partnership business; that in pursuance to said agreement defendant occupied said building for twenty-six months, and that his share of said rental amounted to $390; that when said partnership was finally settled on December 21, 1911, it was agreed and ascertained by and between said Meyers and defendant that the latter's portion of said rental amounted to $390.00, which amount defendant at said time promised and agreed to pay as his share of said rental; that ever since said date defendant has refused to pay said sum and has not paid any part thereof except $45.00; that on May 7, 1915, said George Meyers, for good and valuable consideration, duly assigned, set over and transferred unto plaintiff the said account amounting to $345.00, with interest at 8 per cent per annum from December 21, 1911, and that plaintiff is now the lawful owner and holder of said claim; and plaintiff asks judgment for said amount with interest as stated.

Defendant in his answer denies all the allegations contained in plaintiff's complaint, except he admits that he and plaintiff are both residents of Douglas, Alaska, and that he and George Meyers, plaintiff's husband, on or about November 1, 1909, entered into a partnership agreement whereby they agreed to conduct a general merchandise establishment in the town of Douglas, Alaska. As a separate and affirmative defense and counter claim defendant alleges that, at plaintiff's special in-

stance and request, in Douglas, Alaska, he advanced and loaned to plaintiff $50.00 on or about July 15, 1912, $150.00 on or about January 20, 1915, and $175.00 on or about February 1, 1915, making a total of $375.00, no part of which has been paid, and asks judgment for that sum against plaintiff with interest at 8 per cent per annum from March 1, 1915.

Plaintiff in her reply denies the affirmative defense and counter claim of defendant but says that defendant, at her request, loaned her $200.00 on or about January 20, 1915, but that she repaid that sum to defendant on April 12, 1915.

A trial was on had on December 7, 1915, before the Court and a jury of twelve and thereafter, on December 9, 1915, the jury returned a verdict of $418.35 for plaintiff and against defendant, on which, after motion for new trial being denied, judgment was entered for plaintiff on January 4, 1916.

The case is brought here on writ of error on account of erroneous rulings at the trial in the exclusion and admission of evidence, and in denying defendant's motion for a new trial and in refusing to set the verdict aside, and making and entering judgment thereon.

ERRORS DISCUSSED AND RELIED ON FOR REVERSAL.

THE THIRD ERROR assigned relates to the refusal to permit cross-examination of plaintiff, testifying in her own behalf, in regard to the assignment which she testified had been made to her by her husband (P. R. p. 32), and which she pleaded had been made for good and valuable consideration (P. R. p. 3, 4).

THE FOURTH ERROR assigned relates to the refusal to permit cross-examination of plaintiff, testifying in her own behalf, as to her husband's making an entry in plaintiff's exhibit "B" of the rent account which he claimed against defendant. Plaintiff testified in chief that she knew the book and that it had been written by her husband (P. R. p. 31), and that she knew about the agreement between her husband and defendant (P. R. p. 32).

THE NINTH ERROR assigned relates to the refusal to permit cross-examination of plaintiff's witness George Meyers relative to plaintiff's exhibit "B". The witness on direct examination stated that this exhibit was in his hand-writing and that he had made three entries in it relative to the rent account against defendant and the exhibit was marked for identification in connection with the testimony (P. R. p. 49).

THE EIGHTEENTH ERROR assigned relates to the admission of evidence through leading ques-

tion, over defendant's objection, by plaintiff's witness Louis Saloum. The question was exceedingly suggestive and leading on which ground defendant objected to it, and the witness answered it in practically the identical words used by the questioner. (P. R. p. 63.)

THE NINTH ERROR assigned relates to the refusal to permit cross-examination of plaintiff's witness Louis Saloum as to whether or not plaintiff's husband-assignor had been asked on a former occasion whether or not the defendant owed him any money. The witness had already testified relative to the alleged settlement between Meyers and defendant (P. R. p. 57, 58, 59, 60), giving the substance of conversations between, and statements made by, them, and had also testified relative to a former trial between the parties (P. R. p. 61, 63). The purpose of the question was clearly to lay a foundation for the putting of a further question, i. e.: in substance, as to whether plaintiff's husband on that former occasion had not stated that defendant did not owe him any money; and thus to elicit other statements, including statements against interest, made by witness Meyers, plaintiff's privy, as well as to elicit the whole of a general conversation, namely: the testimony in the former trial.

THE TWENTY-FIRST ERROR assigned relates to the admission of evidence, over defendant's objection, in the cross-examination of defendant, testifying in his own behalf, relative to the loss of

lives of plaintiff's two children, which prejudicial fact was not one of the issues and had nothing whatever to do with the merits of the case.

THE TWENTY-SIXTH ERROR assigned relates to the admission of evidence, over defendant's objection, in the cross-examination of defendant's witness Maloof relative to another action entitled "W. G. Hills v. George Meyers," which was an action entirely foreign to the case at bar, and to the irregularity occurring by plaintiff's counsel in persisting in asking questions relative thereto, although it was not one of the issues of the case nor material thereto, after the question had been excluded.

THE THIRTY-FIRST ERROR assigned relates to the exclusion of evidence in the refusal to permit defendant's witness Maloof, on redirect examination, to explain what he meant when he had said on cross-examination by plaintiff, that he had never talked with anyone about the case. An explanation was particularly necessary as the witness had both on direct and cross-examination admitted that he was very closely associated with the defendant.

THE THIRTY-FIFTH ERROR assigned relates to the refusal to exhibit on cross-examination to defendant's witness Jake Saloum a certain purported writing, which plaintiff contended was in the hand-writing of said witness, and concerning which at the time of the demand and thereafter

plaintiff was permitted to cross-examine the witness.

THE THIRTY-SIXTH ERROR assigned relates to the admission of evidence, over defendant's objections, in the cross-examination of defendant's witness Jake Saloum relative to having heard discussion between the parties concerning the rent account prior to the date of the occurrence concerning which the witness had testified in chief. The testimony of the witness on direct examination was confined solely to an impeachment of plaintiff's exhibits "A" and "B".

THE THIRTY-SEVENTH ERROR assigned relates to the admission of evidence, over defendant's objection, in the cross-examination of defendant's witness Jake Saloum relative to the contents of a certain purported writing which plaintiff contended witness had made but which, although a demand had been made for exhibition, was not exhibited to the witness.

THE FORTY-SIXTH ERROR assigned relates to the admission of evidence, over defendant's objection, in permitting plaintiff, on rebuttal, to testify on direct examination, as to hearsay statements made by her assignor George Meyers, at the time it was contended he asked defendant's witness Jake Saloum to make a copy of plaintiff's exhibits "A" and "B" and concerning which the defendant's witness Jake Saloum had been interro-

gated on cross-examination over defendant's objection.

THE FORTY-EIGHTH ERROR assigned relates to the receiving and filing of the verdict in the case.

THE FORTY-EIGHTH ERROR assigned relates to the making, rendering and entering of the opinion, decision, and order of the court denying defendant's motion for a new trial.

THE FIFTIETH ERROR assigned relates to the making, rendering and entering of the judgment in the case on January 4th, 1916, against defendant for $418.35, with interest at 8 per cent from December 9, 1915.

ARGUMENT

THIRD, FOURTH AND NINTH ERRORS.

THE THIRD, FOURTH AND NINTH ASSIGNMENTS OF ERROR (P. R. p. 169, 170) are herein discussed together, as they all pertain to the exclusion of material and competent evidence, namely; the refusal to permit answers to questions propounded on cross-examination to witnesses testifying on behalf of plaintiff. However, each assignment is discussed specifically as to its particular error.

RIGHT TO CROSS-EXAMINE WITNESS OF ADVERSE PARTY:

The right of a party to cross-examine a witness called by an adversary is too thoroughly impressed on our juristic procedure to require authorities to sustain it — it being a right held in such high esteem by the common law that it has been said that "no evidence should be admitted but what was or might be under examination of both parties."

10 M. A. L., 399.

This right is zealously guarded by the statute of Alaska:

"The adverse party may cross-examine

the witness as to any matter stated in his direct examination or connected therewith, and in so doing may put leading questions; but if he examine him as to other matters, such examination is to be subject to the same rules as a direct examination."

Sec. 1498, C. L. A.

"A party has a right to cross-examine witnesses who have testified for the adverse party, or the adverse party himself when he testifies in his own behalf."

40 CYC 2473, 2474.

THIRD ERROR DISCUSSED SPECIFICALLY

Assignment of Error No. 3 (P. R. p. 169) relates to the refusal to permit the plaintiff, when testifying in her own behalf, to answer on cross-examination the following question:

"Q. How much did you pay your husband, Mrs. Meyers, for this account that he has got against Mike George?" (P. R. p. 36), to which question was interposed and sustained the following objection "Mr. Cheney: I object to that, if the court please, because they have raised no question about its being an assignment; it isn't necessary under the law that she pay him anything—* * *." (P. R. 36).

It can hardly be contended that the question was not cross-examination, i. e.: that the question did not bear on the matters testified to by the witness in her direct examination, as the witness stated on direct examination: "Mr. Meyers assigned over to me this account for rent in this case." (P. R. p. 32.)

GENERAL DENIAL PUTS ASSIGNMENT IN ISSUE.

Hence the objection must have been sustained on the theory that it was immaterial whether or not any consideration had been paid for the assignment. Conceding for the sake of argument, as stated by plaintiff's counsel (P. R. p. 36), it wasn't necessary for plaintiff to pay anything for the assignment, so as to have capacity to sue; yet the fact remains that plaintiff voluntarily had taken upon herself the burden of proving that she did pay something for it. She had sworn under oath (verification to complaint, P. R. p. 4) that her husband "for good and valuable consideration, did assign, set over and transfer unto" her this account. The defendant in this answer had denied these allegations (Answer, P. R. p. 6). It was thus one of the issues of the case.

> "A general denial in an answer by the assignee puts the averment of the assignment of the contract in issue, and the as-

signee to recover must show a valid assignment."

Johnson v. Wickers, 120 N. W. 837, 838; 21 L. R. A. (N. S.) 359.

ASSIGNMENT MUST BE ALLEGED AND PROVED AS ALLEGED.

The pleading of the assignment by plaintiff, if she was to recover as an assignee, was not an unnecessary act; on the contrary it was a fact necessary not only for her to allege but also to prove.

"It is, of course, elementary that an assignee in certain cases must sue in his own name, yet it is necessary for him to allege in his declaration an assignment and to prove the same upon the trial to entitle him to recover."

McKnight v. Lowitz, 142 N. W. 769.

"The assignment was a fact at issue and the proof thereof as essential as that of the indebtedness."

Calloway v. Oro Mining Co., 89 Pac. 1070,1071.

Ford v. Bushard, 48 Pac. 119, 120.

Brown v. Curtis, 60 *Pac.* 773, 774.

Reed v. Buffin, 21 *Pac.* 555, 556.

Bersch v. Sander, 37 *Mo.* 104, 106.

One of the elements of her pleaded assignment

was a good and valuable consideration (P. R. p. 3, 4.). If she failed to prove such consideration, she was neglecting to prove one of the elements on which her pleading said her first cause of action was based — her proof would be a variance to her pleading. It would have been a different assignment than the one spoken of in her complaint.

Suppose she had plead an assignment from a partnership and proved only an assignment from an individual, she would have been unable to recover. The assignment so proved would not be the assignment in issue.

Kibler v. Brown, 114 *Fed.* 1014.
Seeley v. Albrecht, 2 *N. W.* 667, 669.

CONSIDERATION OF ASSIGNMENT WHEN SET OUT MUST BE PROVED AND MUST BE SUFFICIENT.

However, it is begging the question to say plaintiff need not have alleged "good and valuable consideration"; she did plead it, and, having been placed in issue by the defendant, she necessarily must prove it as one of the issuable facts in the case.

> Where the consideration for an assignment was set out, it must be proved and be sufficient."
>
> *Malone v. Adairville Bank*, 6 Ky. L. 440.

(N. B.—The briefer did not have access to this last named case, but 5 C. J. 1010, Note 9 page 1011 says that the case so holds).

Calloway v. Oro Mining Company, supra.

Brown v. Curtis, supra.

Reed v. Buffin, supra

Ford v. Bushard, supra.

The cases wherein it has been held that the consideration of the assignment was immaterial, are, upon examination, we opine, easily distinguishable from the case at bar. In cases so holding the defense has attempted to maintain that the assignee had no capacity to sue because there was no consideration for the assignment; hence, that the assignee could not recover; and the courts undoubtedly have rightly held that such a want of consideration did not militate against the assignee's capacity to sue. This, however, presents a case where the plaintiff has pleaded a certain kind of assignment, namely, an assignment which has as one of its elements a good and valuable consideration and that fact has been put in issue.

She will not be permitted to recover on an assignment, consisting of different elements than the one set up in her pleading, because in such event she would be recovering on a different set of facts than those which she had stated she was entitled to recover on.

CONSIDERATION IS AN ELEMENT OF ASSIGNMENT

We believe that light is shed on these two differentials when the fact is called to mind that an assignment does not differ in its essential elements from any other contract. There must be persons competent to contract, a valuable consideration, a legal subject matter, and mutual assent of the contracting parties.

Commercial Bank v. Rupe, 92 Fed. 789, 795.

Cross-examination on these elements would seem not only admissible, but material, and, in fact, indispensible. If the contract had been a sale or a conveyance, instead of an assignment, the witness could have been cross-examined as to the mode of making the sale, the consideration therefor, the person to whom the consideration was paid, the manner of payment, the contract under which the sale was made, actual ownership, and other matters pertinent to the transaction.

Classman v. C. R. I. & P. Ry. Co., 147 N. W. 757.

Renton v. Monnier, 19 Pac. (Cal.) 828.

40 CYC. 2498.

ASSIGNMENT MAY BE EXAMINED INTO AS TO PARTICULARITIES AND ELEMENTS

The consideration, good and valuable, of whatever it consisted was one of the constituent parts

of the assignment in issue. It would hardly be contended that the plaintiff on direct examination would have been confined to her answer "Mr. Meyers assigned over to me this account for rent in this case" (P. R. p. 32). She certainly could have stated when and where the transaction took place and the particulars of it.

Beezley v. Crossen, 17 Pac. (Ore) 577, 579.

Bank of La Grande v. Hunter, 57 Pac. (Ore) 424, 426.

CROSS-EXAMINATION MAY, THEREFORE, BE MADE AS TO CONSIDERATION OF ASSIGNMENT

"The assignment recited that it was made in consideration of 'one dollar and other good and valuable considerations.' It was therefore competent to show by parole what the other good and valuable considerations were."

Frame v. Attemeier, 133 N. W. 603, 604.

"Plaintiff sued as assignee of a claim against a firm in which the answering defendant was a special party. Defendant denied the assignment of the claim. The account on the firm books was in the name of the assignor 'in trust.' On cross-examination of such assignor, who had identified the instru-

ment of assignment, he was asked if he 'was in trust' and 'had the account in trust for someone?' Plaintiff's objection to the question was sustained. Held error, as the question bore directly on the question of the validity of the assignment."

Chambers v. Webster, 75 N. Y. S. 31; 61 App. Div. 546.

CROSS-EXAMINATION OF PARTY HIMSELF GIVEN WIDER RANGE THAN OF WITNESS NOT THE PARTY

And in any event, considerable latitude is allowed in the cross-examination of a party who testifies in his own behalf, and in such case the examination may take a wider range than would be permissible if the witness were not a party.

40 CYC. 2508, and cases cited.

PURPOSE OF QUESTION

The purpose of the question was clearly threefold: (a) to draw out the circumstances and elements of the alleged assignment; (b) to test the memory and veracity of the witness; (c) and, if she answered contrary to her own pleading, to afford an opportunity to impeach her and impugn her credibility before the jury. All of which purposes were necessarily calculated to obtain an answer tending to either explain, modify, discredit

or disprove her statement on direct, and therefore the question was proper cross-examination.

> "Any narration by a witness tending to explain, modify, discredit, or disprove his testimony in chief may be demanded of him on cross-examination."
>
> *Furbeck v. Gevurtz*, 72 Ore. 12; 142 Pac. 654, 656.

PREJUDICIAL EFFECT OF EXCLUSION OF EXAMINATION

The sustaining of the objection left no opportunity for the defendant to inquire into the assignment although it was one of the issues of the case, there being no further testimony by any of the plaintiff's witnesses in regard to it, except that of her husband, George Meyers, who when testifying on her behalf, made the significant statement on direct examination: "He (referring to defendant) still owes me the balance for the rent" (P. R. p. 50); disclosing the possible fact that plaintiff, if she had been permitted to answer, would have been obliged to contradict her sworn pleading, as it is highly improbable that she or any other person would pay a consideration for something from which she or he was to derive no benefit. If her husband's statement is true it would indicate that her pleading was false or else that she had done this very improbable thing. If she had so contradicted herself then she would have

been subject to impeachment under the provisions of the statute which provides:

> "A witness may be impeached by the party against whom he was called, by a contradictory evidence, * * *"
>
> Sec. 1501, C. L. A.; Sec. 669 Carter Code.
>
> "A witness may also be impeached by evidence that he has made at other times statements inconsistent with his present testimony * * *."
>
> Sec. 1502, C. L. A.; Section 670, Carter Code.
>
> "The credit of a witness may be impeached by proof that he has made statements out of court, concerning matters relevant to the issue, inconsistent with his testimony given at the trial."
>
> *Smithson v. So. Pac. Co.*, 60 Pac. (Ore) 907, 912.

FOURTH ERROR DISCUSSED SPECIFICALLY

Assignment of Error No. 4 (P. R. p. 169) relates to the refusal to permit the plaintiff, when testifying in her own behalf, to answer on cross-examination the following question:

> "Q. About the rent in there, did your husband write down in this book about the

rent too?" (P. R. p. 37), to which question was interposed and sustained the objection that it was not cross-examination. (P. R. p. 37.)

QUESTION BORE ON MATTERS TESTIFIED TO IN CHIEF

Page 3 of the identical book referred to in the question had been marked plaintiff's exhibit "A" for identification (P. R. p. 31) during plaintiff's direct examination and page 2 thereof was, in fact, later marked plaintiff's exhibit "B" for identification (P. R. p. 49), and was afterwards contended by plaintiff's witness George Meyers (P. R. p. 49) to constitute a statement of the rent account.

Plaintiff, in her own behalf, on direct examination had stated: "I would know the book; that is the book and he know it too; *that is the book I had my husband put it down in* when he paid * * * This book is in Mr. Meyers' writing * * * *I saw Mr. Meyers write it in the book.* * * *. This is the book, and he knows it too." (P. R. p. 31.)

She further testified on direct examination: "*I know about the agreement Mike George and George Meyers had about the rent for the store building that George Meyers owned;* my husband tell me; both to pay $30.00 a month; Mike George's half of that was half of $30.00 a month. At the time he (referring to defendent) finished partner-

ship with my husband he moved some goods, and he said: 'I am going to pay rent and make a new store; I ain't got much money to pay now; after while I pay you.' He talk like that to my husband three or four times; *he come to my house and he say*: 'Ain't got no money now; I am going to start and make a new store.' I don't think he paid nothing for the rent of the store. He said he would pay after while." (P. R. p. 32.)

This testimony presumably all related to the issues of the case, and the book entries were undoubtedly introduced by plaintiff for the purpose of strengthening her story. The book was not used by plaintiff as a memory refresher, but entirely to get an inanimate, white and black page corroboration.

Having thus testified relative to the book, having identified it, having stated that it was in her assignor's hand-writing, having testified she knew about the agreement between her husband and defendant, the question bore directly on matters relating to which she, the witness, had testified in chief.

QUESTION TENDED TO PRODUCE EXPLANATION AND MODIFICATION OF THE TESTIMONY IN CHIEF

The question was calculated to ascertain whether plaintiff really did know the book; whether her husband actually had written it, or any of it;

whether all the entries in the book had been made in her presence; what she knew about the alleged stated account.

EXPLANATION AND MODIFICATION OF TESTIMONY IN CHIEF IS LEGITIMATE CROSS EXAMINATION

Defendant was entitled on cross-examination to propound such questions to the witness as would tend to explain, modify, discredit, or disprove her testimony in chief, and the question put was clearly intended to elicit such information.

Furbeck v. Gevurtz, supra.

BOOK PRODUCED AND IDENTIFIED BY WITNESS

The plaintiff and George Meyers, the writer of the book, were closely related in interest, standing in the relationship of wife and husband, assignee and assignor, party and witness. The entries, at least in part, were made at the instance of plaintiff as she says, referring to her first cause of action: "I got it marked on the book; I bring the money all the time and told my husband to mark it in the book; I cannot write myself, and he can't, so he told my husband to put it down. When he paid me *I had my husband put it down in the book in my language, Syriac.*" (P. R. p. 30, 31.) Having thus testified, as well as identifying the book the book (P. R. p. 31) and stating that she knew

about the agreement between Meyers and the defendant (P. R. p. 32), it would seem competent to cross-examine her on these facts in connection with the book. Moreover, the witness was the plaintiff herself, testifying in her own behalf, and a wider range of cross-examination was therefore permissible than under other circumstances.

40 CYC. 2508, supra, and cases cited.

IF BOOK PRODUCED AND IDENTIFIED BY WITNESS, LATTER MAY BE CROSS-EXAMINED CONCERNING SAME

It is a general rule that a witness may be cross-examined as to a writing which he has used to refresh his memory, or identified or concerning which he has testified on direct examination, although the paper was not introduced in evidence.

40 CYC. 2499, 2500, and cases cited.

NINTH ERROR DISCUSSED SPECIFICALLY

Assignment of Error No. 9 (P. R. p. 169) relates to the refusal to permit the witness George Meyers, on cross-examination, when testifying for the plaintiff, his wife, to answer the question requesting him to read plaintiff's exhibit "B" to the jury. The court refused to allow the question on the ground that it was incompetent, irrelevant and immaterial (P. R. p. 53.)

WITNESS ON DIRECT EXAMINATION HAD TESTIFIED CONCERNING, HAD IDENTIFIED, AND HAD PROVED BOOK

The witness on direct examination had stated "*Mike paid me* $45.00 *for rent* and after that I had to wait as there was no money left. *I entered that in the book at the time he paid me. I write it in the book * * *. I marked on the second page of the book* when Mike paid me the $45.00 for rent. I have had this book seven or eight years. (At this point page 2 of the book was marked plaintiff's exhibit "B" for identification.) *The three entries on page* 2 *are* $15.00 *each. Mike George never paid me only* $45.00 *for rent.*" (P. R. p. 49)

It is therefore apparent that the trial court had inadvertently overlooked this testimony when it stated in sustaining the objection "all that he has told is simply that this man has identified that page; he simply says that it is his writing." (P. R. p. 53.

WHERE WITNESS USES BOOK TO REFRESH MEMORY, OR IDENTIFIES IT OR TESTIFIES CONCERNING IT, OR PROVES ENTRIES, WIDE RANGE OF CROSS-EXAMINATION IS PERMISSIBLE

"A witness may be examined as to a writing which he has testified on his direct

examination, although the paper was not introduced in evidence."

40 CYC. 2499, supra, and cases cited.

"Where plaintiff becomes the witness to prove his book entries, in an action for goods sold, he can be cross-examined by defendant."

Clough v. Little, 3 Rich. Law 353.

The witness having based his testimony, if not his recollection, in a large measure upon the book, page 2, a very wide latitude should have been allowed to the defendant upon cross-examination in respect thereto.

State v. Shew, 57 Pac. (Kan) 137, 139.

Moreover the defendant had a right to cross-examine the witness upon page 2, as the witness had stated that he had marked on the identical page the amounts which the defendant had paid him; that he had written them; and that there were three entries on the page of $15.00 each; and that the only amount which Mike George had paid him on the rent was $45.00.

The sum of the three entries so referred to by the witness was $45.00, the identical amount set out in plaintiff's compaint; and not only had the page been identified by the witness, but it had been marked for identification in the record in connection with his testimony (P. R. p. 49), and defendant therefore had the right to cross-examine in regard to it.

Brigham City v. Crawford, 57 Pac. 842, 843.

Kirchner v. Loughlin, 28 Pas. 505, 508.

"Where a witness is examined in his direct examination as to an affidavit made by him, he may be questioned on cross-examination as to whether he swore that its contents were true without a production of the document itself."

Harris v. Terry, 98 N. C. 131; S. E. 745.

"A witness may be cross-examined as to items of a ledger which he has put in evidence."

40 CYC. 2500, and cases cited.

Thayer v. Barney, 12 Minn. 502.

"Where a witness has testified for the plaintiff in reference to entries of measurements. (*In the case at bar payments of moneys*) (Italics ours) in his book, the defendant may cross-examine the witness in reference to those entries and the headings of the same for all purposes of the defense; the entire account, although composed of many items, is, in the eye of the law, but one memorandum and one entry, and the defendant is entitled to the whole of it."

Green v. Caulk, 16 Md. 556.

The question was calculated to disclose that the entries did no corroborate the witness' oral testi-

mony and were not as he had contended, and that the entries were false. Hence, the question was permissible as it came within the general rule that any narration by a witness tending to explain, modify, discredit, or disprove his testimony in chief may be demanded of him on cross-examination.

Furbeck v. Gevurtz, spura.

Furthermore, a reading of the entries, if they were honest entries, could have in no wise injured plaintiff. But, if they were not as the witness contended, then what course could have been pursued better calculated to expose their falsity than the reading of them by the person who testified he had made them. (P. R. p. 49.)

EIGHTEENTH ERROR

The Eighteenth Assignment of Error (P. R. p. 171, 172) relates to the admission of evidence, i. e.: the permitting of plaintiff's witness Louis Saloum to answer on re-direct examination over defendant's objection that it was leading, the following question:

"Q. Now, what I want to get at, what do you mean by the word settling—do you mean they pay afterwards; was there anything more said about them settling?" (P. R. p. 63.)

STATUATORY DEFINITION OF LEADING QUESTION

The Alaska statute defines a leading question in the following terms:

"A question which suggests to the witness the answer which the examining party desires is denominated a leading or suggestive question. On a direct examination, leading questions are not allowed, unless merely formal or preliminary, except in the sound discretion of the court, under special circumstances, making it appear that the interests of justice require it." Sec. 1496, C. L. A.

This is practically the same as the definition given by the text writers.

40 CYC. 2423 and cases cited.

1 *Greenl. Ev.* (16th Ed. 343.

Daly v. Melendy, 49 N. W. 926, 928.

LEADING QUESTIONS ARE IMPROPER

"It is a well settled general rule that leading questions are improper and should not be put to a witness. This rule applies in the examination of a party testifying in his own behalf as well as in the examination of any other witness, and is recognized and enforced in criminal, as well as in civil cases."

40 CYC. 2422, 2423, and cases cited.

Busch v. Robinson, 81 Pac. 237, 238.

Nurnberger v. U. S., 156 Fed. 721, 732, et seq.

Hemrich v. Hemrich, 84 Pac. 327, 329.

QUESTION WAS NEITHER FORMAL NOR PRELIMINARY

An analysis of the question shows that it was not formal or preliminary; it went to the very gist of the contention that there was a stated account. An examination of the cross-examination (Ev. Louis Saloum, P. R. p. 60, 61, 62) discloses that there was no ambiguity which had arisen and which was necessary to explain away. The question was plainly purposed not only to elicit an explanation of ordinary words with well known and common meanings; namely: the witness' own statement on redirect examination "and Mike said 'you have got no money, and I have no money and we will settle that afterwards'" (P. R. p. 63), but what was even more serious it directly called for an affirmation that they, defendant and George Meyers, said they would pay and settled afterwards, which was of the very gist of the proof of the alleged stated account.

DISCRETION VESTED IN COURT TO PERMIT LEADING QUESTIONS IS NOT AN ARBITRARY OR ABSOLUTE ONE

> "The discretion vested in the court by reason of *Sec.* 1496 *C. L. A. supra* (Italics ours) is not an arbitrary or absolute one, and if on appeal it appears that leading questions were permitted over the objection on direct ex-

amination, under circumstances indicating a manifest abuse of such discretion the judgment will be reversed."

State v. Ogden, 65 Pac. (Ore) 449, 451.

SPECIAL CIRCUMSTANCES DID NOT EXIST FOR A LEADING QUESTION, AND ITS ALLOWANCE BY COURT WAS AN ABUSE OF HIS DISCRETION

There was nothing disclosed in the record as to any special circumstances requiring a leading question; the witness had acted as interpreter at the trial (P. R. p. 45); he claimed that he had done the figuring for the witness George Meyers and the defendant in their alleged settlement (P. R. p. 60); his evidence as shown by the record discloses that he had good command of the English language (P. R. Ev. of Louis Saloum); and his intelligence, as well as the leading character of the question, is conclusively demonstrated by the fact that he answered it in almost the identical words of the counsel, namely, "A. They said they would pay it afterwards—settle it afterwards—fix it afterwards." (P. R. p. 63). It is therefore apparent that the court in the exercise of its discretion exceeded that sound discretion allowed it by the statute, and permtited the leading question on one of the most important elements of the stated account, namely: that the defendant had agreed to pay the amount. Plaintiff's witness Saloum was

called by plaintiff to prove this agreement. Without it, her case on the stated account would necessarily fall, as there was no creditable evidence of any presentation of the account to the defendant; and it was upon this point that was hinged that vital salient of the stated account, i. e.: defendant's agreement to it. This being so, we urge that it is ground for reversal.

State v. Ogden, supra.

NINETEENTH ERROR

The Nineteenth Assignment of Error (P. R. p. 172 (relates to the exclusion of evidence, i. e.: the refusal to permit plaintiff's witness Louis Saloum, to answer on re-cross-examination the following question:

> "Q. Louis, in that case you were talking about a moment ago in the Commissioner's Court, wasn't George Meyers asked whether or not Mike George owed him any money" (P. R. p. 64) to which was interposed and sustained an objection that it was not competent. (P. R. p. 64.)

QUESTION TENDED TO ELICIT ADMISSION AGAINST INTEREST MADE BY PLAINTIFF'S PRIVY

The witness in his direct examination had stated the substance of alleged conversations between defendant and the plaintiff's assignor, George

Meyers, and that he had made figures for them and that they had said there was some money due Meyers for rent and due Mrs. Meyers for work, and that George Meyers and the defendant agreed that the defendant owed Meyers rent for two years and two months at $15.00 a month, and that Meyers owed the defendant $242.50. (Ev. of Louis Saloum, P. R. p. 57, 58, 59, 60.)

The question propounded was calculated to bring out an admission against interest made by George Meyers, plaintiff's assignor (P. R. p. 3), who, in his testimony had stated that the defendant still owed him for the rent. (P. R. p. 50).

QUESTION TENDED TO ELICIT ADMISSION AGAINST INTEREST MADE BY PLAINTIFF'S PRIVY, AND, WAS, THEREFORE, COMPETENT

"Oral admissions of a party are competent evidence against him."

16 CYC. 942, and cases cited.

"Declarations of a person beneficially interested in result of litigation are admissible against the nominal party representing his interest."

16 CYC. 984, and cases cited.

"Statements of irrelevant facts made by persons identified in legal interest with the party to the record by reason of privity are competent evidence."

16 CYC. 985, and cases cited.

"In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense existing at the time of or before notice of the assignment, * * *." Sec. 858, C. L. A.

The question, answered in the affirmative, would have permitted the admission of a statement bearing directly on the issues of the case, namely: Whether or not the plaintiff's assignor had stated prior to the making of the alleged assignment that the defendant was indebted to him. The question should therefore have been allowed as it is the rule that a witness may be interrogated as to admissions against interest of the party for whom he has testified.

40 CYC. 2487, and cases cited.

Thomas v. C. & G. T. Ry. Co., 86 Mich. 496; 49 N. W. 547, 548.

Tiner v. State, 109 Ark. 139, 158 S. W. 1087.

QUESTION TENDED TO ELICIT REMAINDER OF CONVERSATION CONCERNING WHICH TESTIMONY HAD BEEN GIVEN ON REDIRECT

Furthermore the question related to what may be termed a general conversation, i. e., testimony in the prior suit (Ev. Louis Saloum, P. R. p. 61, 63), and the witness, in relating said general con-

versation, had said that "I don't say anything about the $345.00 to any one," and that on the former occasion he had testified that *all that was owing between these parties was that George Meyers owed Mike George* $242.50 (P. R. p. 61.) He also stated on redirect examination, referring to the same conversation "He (referring to Mike George's counsel in the prior suit) asked me in regard to the $252.50, but said nothing about the $345.00" (P. R. p. 63), leaving a tacit, if not an express, implication that the reason nothing was said about the $345.00 in the testimony in the prior suit was because it was an accepted fact at that time that the defendant did owe the witness George Myers that sum of money.

QUESTION TENDED TO ELICIT REMAINDER OF CONVERSATION CONCERNING WHICH TESTIMONY HAD BEEN GIVEN ON REDIRECT EXAMINATION, AND WAS, THEREFORE, COMPETENT

The witness having thus testified as to certain statements on a certain material matter of another person, namely, George Meyers, was subject to being interrogated as to other statements on the same matter of such person.

40 CYC. 2487, and cases cited.

"No rule is plainer than that a party

has the right upon cross-examination to have given all other parts of the same conversation, not given in the examination in chief, which will serve to explain or to modify the tendency of that part testified to in chief."

U. S. v. Knowlton, 3 Dak. 58, 13 N. W. 573.

People v. West, 146 Cal. 848, 849.

Gibbons v. Territory, 115 Pac. 129.

QUESTION WAS RELEVANT TO THE ISSUES, AND, THEREFORE WAS ADMISSIBLE

The question went to one of the very bones of contention, namely, whether or not the defendant owed the witness Meyers rent for two years and two months at $15.00 a month, and it was therefore revelant. One part of the conversation having been given in redirect examination, the remainder was properly to be called out by re cross-examination.

Merrill v. Merrill, 187 Ill. App. 589.

St. Louis & S. F. Ry. Co. v. Cundieff, 171 Fed. 319.

Bruce v. Bevis, 56 Wash. 547; 106 Pac. 129.

But, of course, it could not be ascertained whether all of the conversation had been given until the question under discussion was put and answered. There could scarcely be conceived any

better evidence to disclose the real truth of the merits of plaintiff's second cause of action, than a statement made by her assignor that the defendant did not owe him any money under it.

TWENTY-FIRST ERROR

The Twenty-first Assignment of Error (P. R. p. 172) relates to the admission of prejudicial evidence over defendant's objection, i. e., the refusal to sustain defendant's objection to questions propounded on cross-examination as follows:

> "Q. And at the time of that fire there were two of her children burned up? A. Yes, sir. Mr. Robertson.—We object to that as immaterial. Q. And that didn't make any impression on your mind so you can tell this jury when that happened—those two children, and lots of the goods that were in the building lost, and still you don't remember when that fire occurred? Mr. Robertson—We object to that as argumentative." (P. R. p. 70, 71.)

CROSS-EXAMINATION WAS ON COLLATERAL MATTERS, AND ITS EFFECT WAS PREJUDICIAL

The question "and at the time of the fire there were two of her children burned up?" was clearly not calculated to elicit any information as to the merits of the controversy. There was no issue in the case which required proof of the loss of the

lives of two of the plaintiff's children. However, having answered it, plaintiff insisted, over objection, on going further. The second question was directly calculated to intimate to the jury that the defendant was of such a mental disposition that even the loss of lives of children would make no impression on him—it was literally characterizing him as a base degenerate—a man bereft of all human sentiment. Yet the father of these very children stated on chief that the house burned in March, 1910, (Ev. George Meyers, P. R. p. 54) and on rebuttal that it burned on September 18, 1910 (Ev. George Meyers, P. R. p. 117). Was there anything then so strange in the statement, that, "I think the fire occurred the first part of 1910, but I did not have it marked down, * * *. I don't remember whether the fire occurred in 1909 or 1910," (Ev. Mike George P. R. p. 70) made by the defendant, when the father himself of the children first testified that it occurred in March, 1910. Was this lack of recollection on the defendant's part so pernicious as to justify the hurling at him on cross-examination of counsel's implied anathma: "And that didn't make any impression on your mind so you can tell this jury when that happened—those two children, and lots of goods that were in the building lost, and still you don't remember when that fire occurred?" (P. R. p. 71). The very fact that the trial court permitted the question over objection to be answered could only have

served to impress more strongly upon the jury the prejudicial fact that the defendant was such an execrable being that the fact, i. e., the loss of two children under most terrible circumstances, had slipped from his memory without an impression of its awfulness.

Who is there that can say that these questions with their answers did not sway the jurors in the rendition of their verdict? The plaintiff was a woman. It was her flesh and blood that had been so terribly destroyed by the holocaust. Was a lapse of five years so great, that the telling of the horrible tragedy may not have swayed the hearts of the individuals sitting in judgment as between plaintiff and defendant? What man has not had his sympathies moved by seeing of a play or the reading of a book? Here, were living actors before human jurors and the effect of the rehearsal was not diminished by the questions. The evidence for plaintiff cannot, even by herself, be contended to be overly strong in her favor—her story wavers, shakes, trembles. Did not these questions add the needed prejudice to throw the verdict to her? Who is there to say? The fact remains that these horrible extraneous matters were laid bare to the jury's gaze. And, the verdict was for the plaintiff.

It is apparent that the merits of the controversy in no wise involved the necessity of proof of the death of plaintiff's children. There can be no contention that such evidence enlightened the jury.

For what purpose then could the testimony have been elicited save to prejudice the jury by the information thus conveyed to them both in the questions and the answers.

CROSS-EXAMINATION WAS ON COLLATERAL MATTERS, AND ITS EFFECT WAS PREJUDICIAL. SUCH CROSS- EXAMINATION IS NOT ADMISSIBLE

It is a general rule that cross-examination should not be extended to collateral, irrelevant or immaterial matters. While this rule is not applied with the same strictness in cross-examination as in direct examination, yet where the only effect of the cross-examination on collateral matters would be to prejudice the minds of the jurors it should not be permitted.

40 CYC. 2493, 2495, 2496, and cases cited.

State v. McCann, 43 Ore. 155; 72 Pac. 137, 138.

Crossen v. Grandy, 42 Ore. 282; 70 Pac. 906, 908.

Oldenberg v. Ore. Sugar Co., 39 Ore. 564, 65 Pac. 869, 870, 873.

Furbeck v. Gevurtz, 72 Ore. 12; 142 Pac. 654, 656.

Kittenback v. United States, 202 Fed. 377, 387.

Mines, etc. Co. v. Park etc. Co. 107 Fed. 881, 883, 884.
Allen v. United States, 115 Fed. 3, 11.
State v. Belknap, 87 Pac. 935.
Hurst v. Burnside, 8 Pac. 888, 889
Ansland v. Parker, 85 N. W. 192, 193.
Grace v. Anderson, 116 N. W. 116, 118.
Hancock v. Blackwell, 41 S. W. 205, 208
St. Jean v. Lippitt Wollen Co., 69 Atl. 604, 605.
Lesley v. Ewing, 90 Atl. 797.
Kane v. Transit, 93 Atl., 1001, 1003.
Frieman v. Paper Co., 139 N. W. 540, 544.
Wallen v. Wallen, 57 Pac. S. E. 596, 598.
In re Barney, 44 Atl. 75, 76.

TWENTY-SIXTH ERROR

The Twenty-sixth Assignment of Error (P. R. p. 173) relates to the admission of prejudicial evidence, i. e., the permitting the witness George Maloof, over defendant's objection that the question was immaterial, incompetent, irrelevant and not the best evidence, to answer on cross-examination questions relative to a suit designated as "W. G. Hills" against George Meyers.
(Ev. Maloof, P. R. p. 87, 88.)

CROSS-EXAMINATION WAS ON COLLATERAL MATTERS

It can not be argued that the matters involved in the questions were either competent, relevant or material to the issues of the case at bar. This is fully disclosed by the want of anything in the record to connect them to the case at bar. There were only two possible purposes of the questions, i. e., either to obtain information as to another case not then on trial, or else to imply that the defendant and the witness were persecuting the plaintiff and her husband by other cases.

PREJUDICIAL INFORMATION WAS CONVEYED TO THE JURY BY THE QUESTIONS

It is true that plaintiff was not permitted to go far into details, but there was no need as it is undoubtedly true that prejudicial information may be conveyed to the jury through questions as well as through answers, and in this case it was plainly given them by the questions.

Batchelder v. Manchester St. Ry., infra.

PERSISTENCE IN ASKING QUESTIONS WHICH HAVE BEEN EXCLUDED IS IMPROPER

The question was asked three times, each time over objection, and on the last occasion after it had been excluded.

"It is highly improper for counsel to persist in asking a question which has been excluded."

38 CYC. 1478, and cases cited.

Batchelder v. Manchester St. Ry., 56 Atl. 752, 753.

Cleveland, etc. R. Co., v. Pritchan, 69 N. E. 663, 100 Am. St. Rep. 682, 687, & Note 2, p. 690.

Louisville & N. R. Co. v. Payne, 118 S. W. 353, 354.

Bergman v. Solomon, 136 S. W. 1010, 1011.

Shield Admr's v. Rowland, 151 S. W. 408, 410.

Dandel v. Wolf, 138 N. W. 814, 815.

Raefelt v. Koenig, 140 N. W. 56, 58.

PERSISTENCE IN ASKING QUESTIONS ON COLLATERAL MATTERS, WHICH HAVE BEEN EXCLUDED, IS GROUND FOR REVERSAL

And the persistence in the attempt to introduce evidence, irrelevant, immaterial and foreign to the issue, after the court has denied the right to do so, is ground for reversal and new trial.

McClendon v. Bank, 174 S. W. 403, 405.

THIRTY-FIRST ERROR

The Thirty-first Assignment of Error (P. R.

p. 174) relates to the exclusion of evidence, namely: the refusal to permit the witness George Maloof, who was testifying on behalf of the defendant, on redirect examination to answer the following question:

"Q. Did you mean to tell Mr. Cheney you never talked about the case in that way?" to which was interposed and sustained the objection that it was suggestive. (P. R. p. 91.)

QUESTION WAS PURPOSED TO BRING OUT EXPLANATION OF AMBIGUOUS STATEMENT MADE ON CROSS-EXAMINATION

The question, as indicated by defendant's counsel (P. R. p. 91, 92), was clearly for the purpose of having the witness clear up in the minds of the jury his statement on cross-examination, namely; "I did not talk with Mike about the case before I came over." (P. R. p. 71), which statement was calculated to discredit the witness inasmuch as he further testified on cross-examination "I have been a witness for Mike several times before in the Commissioner's Court (P. R. p. 87) * * *. I have been working in the store for Mike (P. R. p. 87) * * * In 1915 I worked in Mike's store (P. R. p. 90), * * * I. lived in the big house with Mike" George (P. R. p. 90) and had also testified on direct examination (P. R. p. 85, 86, 87) that he had worked for, lived with and helped in the

store of, the defendant. These statements disclosed such a close intimacy between said witness Maloof and defendant, that without an explanation of it, his bald statement "I did not talk with Mike about this case before I came over" (P. R. p. 91) was sufficient in itself alone to convict the witness in the eye of the jury of falsifying. The exclusion of the answer therefore left the witness' statement unexplained—and from thenceforth his testimony must have been clothed in the eyes of the jury with a fabric of falsity to the prejudice of defendant.

LEADING QUESTIONS ARE PERMISSIBLE TO DRAW OUT EXPLANATION OF AMBIGUOUS STATEMENTS MADE ON CROSS-EXAMINATION

The latter was entitled to have this false fabric removed by an answer to the question.

"The court ought always permit a witness to explain his testimony before leaving the stand."

Oberfelder v. Kavanaugh, 32 N. W. 295, 298.

"A witness who has given out an erroneous impression of the facts concerning which he has testified has a right, while still under examination, to make correction in the presence of the jury."

Pac. Exp. Lumber Co. v. North Pac. Lum. Co., 80 Pac. 105; 40 Ore. 194.

"It is not error to permit a witness to

make an explanation of statements made by him on the witness stand, or to permit him to correct any mistake he may have made in giving his testimony."

Tiffin v. Lewiston, 6 Ida. 231; 55 Pac. 545.

U. S. v. Randall, Fed. cas. 16118.

Hogan v. Reynolds, 8 Ala. 59.

Henry v. State, 19 So. 23.

Olferman v. Un. Dept. Ry. Co., 125 Mo. 408; 28 S. W. 742; 46 Am. State 483.

"A leading question may be put to ascertain the real meaning of a witness who has given an ambiguous answer or whose answer was obviously a lapsus linguae; and, where it is apparent that a witness has answered a question under a misapprehension as to its meaning, it is not error to allow him to be asked a leading question for the purpose of ascertaining what he in fact meant by his answer."

40 CYC. 2433, and cases cited.

"It is proper on re-examination to draw from the witness an explanation of his statements on cross-examination, or of matters brought out on cross examination. A witness may also be asked as to his reasons for his statements on cross-examination or at other times, or for acts or conduct on his part which

have been brought out, or interrogated as to circumstances tending to correct wrong impressions which might result from matters brought out on cross examination."

40 CYC. 2524, et seq., and cases cited.

THIRTY-FIFTH AND THIRTY-SEVENTH ERRORS

THE THIRTY-FIFTH AND THIRTY-SEVENTH ASSIGNMENTS OF ERROR (P. R. p. 175) are herein discussed together as both relate to cross-examination by plaintiff of defendant's witness Jake Saloum, over defendant's objection, relative to a purported writing, namely, a copy of plaintiff's exhibits "A" and "B", without an exhibition of the writing to the witness, although demand was made by defendant for its exhibition and production, and without an introduction of the writing in evidence.

Assignment of Error No. 35 relates to the refusal to require, after demand having been made therefor, the exhibition of the writing to the witness concerning which he was cross-examined:

"Q. As a matter of fact, Mr. Saloum, didn't you make a copy of that book yourself, of those items in that account, and show it to me there in the office? A. I don't remember that at all. Q. You would not dispute that? A. I cannot remember it. Q. You would not swear that you did not? A. No.

I cannot remember it. Mr. Robertson—If the Court please, if this man has a copy in this man's handwriting it is no more than right that he should exhibit it. The Court—It is not necessary that he do so." (P. R. p. 107.)

Assignment of Error No. 37 relates to the admission of evidence on cross-examination by plaintiff, over defendant's objection and after defendant's demand for exhibition to the witness of the writing referred to in the Thirty-Fifth Assignment of Error (P. R. p. 107), of defendant's witness Saloum, the record appearing as follows:

"Q. And didn't you at that time have a piece of paper—I think it was white paper with an account on it, and didn't you show that to me at the time—an account about the rent and the claim that Mrs. Meyers has now at this time against Mike? Judge Gunnison—We object to that as incompetent, irrelevant and immaterial; it is indefinite as to time, persons present, and there is no identification as to anything that was said about it." (P. R. p. 110).

WRITING SHOULD BE EXHIBITED TO WITNESS BEFORE HE IS CROSS-EXAMINED THEREON

It is a general rule that a witness cannot be cross-examined as to the contents of an instrument written or signed by him until it is exhibited to him,

or the contents thereof are read to him.

40 CYC. 2500, and cases cited.

"Where the cross-examination to impeach a witness relates to prior inconsistent statements made by the witness in writing the writing must first be shown the witness for identification, and, if he admits that he is the author of it, it must be read in evidence before he can be cross-examined as to its contents."

10 M. A. L. 403.

This general rule is supported by statutory provisions in Alaska, to-wia:

"A witness is allowed to refresh his memory, respecting a fact, by anything written by himself or under his direction at the time when the fact occurred or immediately thereafter, or at any other time when the fact was fresh in his memory and he knew that the same was correctly stated in writing. But in either case the writing must be produced, and may be inspected by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So, also, a witness may tesify from such a writing, though he retain no recollection of the particular facts; but such evidence shall be received with caution." Sec. 1497, C. L. A.

"A witness may also be impeached by

evidence that he has made at other times statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present; and he shall be asked whether he has made such statements, and, if so, allowed to explain them. If the statements be in writing they shall be shown to the witness before any question is put to him concerning them." Sec. 1502, C. L. A.

There was no such writing in evidence at the time of the propounding of the questions embraced in these two assignments, nor was any such writing placed in evidence at any time during the trial, nor was any proof offered of its loss. It was therefore improper on cross-examination to ask the witness as to the contents of such writing, and, if the plaintiff desired to show the contents and cross-examine upon them, she should have exhibited the writing to the witness and introduced it in evidence.

O'Riley v. Clampet, 55 Minn. 539; 55 N. W. 740.

Morford v. Peck, 46 Conn. 380.

Insurance Co. v. Throop, 22 Mich. 146; 7 Am. Rep. 638.

Arnold v. Cheesebrough, 30 Fed. 145.

Calderon v. O'Donohue, 47 Fed. 39.

Richmond & D. R. Co. v. Jones, 9 So. 276.

Houser v. State, 93 Ind. 228.

McKnight v. U. S., 122 Fed. 926, 928.

Kirchner v. Laughlin, 28 Pac. 507, supra.

The witness stated when the prejudicial question was first propounded that he could not remember whether he had made a copy of the book, i. e., of the items in the account, and shown it to the plaintiff's counsel. There was no production of the writing although later the witness George Meyers, over objection (P. R. p. 121), the witness Antone Meyers (P. R. p. 128), and the plaintiff (P. R. p. 133), when testifying in behalf of plaintiff on rebuttal were all interrogated in reference to the same purported writing. If the writing did in fact exist and was made by the witness Jake Saloum it should have been exhibited to him before he was required to testify with reference to it.

Teller v. Ferguson, 51 Pac. 429, 432.

WITNESS CANNOT BE EXAMINED CONCERNING WRITING WHEN HE HAS NOT ADMITTED THE SAME

"If the witness *had denied or had not admitted* the part of the letter shown, he could not have been examined concerning the contents of the letter, nor could opposite counsel

in that case have been entitled to look at the paper."

Wright v. Bragg, 96 Fed. 729, 733.

QUESTIONS ERRONEOUSLY ASSUMED CONTENTS OF WRITING, WITHOUT WRITING HAVING BEEN EXHIBITED TO WITNESS

Plaintiff's question in both instances represented and assumed the very contents of the writing, if it existed, namely, that the writing was a copy of the book which was already in evidence, with a statement of the items of the account therein.

"The rule that the witness' attention must first be called prevails in cross examining a witness as to the contents of a letter or other paper written by him; but it is here *applied in a peculiar and stringent form.* The counsel *will not be permitted to represent in the statement of a question, the contents of a letter*, and to ask the witness whether he wrote a letter to any such person with such contents, or contents to the like effect, *without having first shown to the witness the letter*, and having asked him whether he wrote that letter, and his admitting that he wrote it, for the contents of every written paper, according to the ordinary and well established rule of evidence are to be proved by the paper itself, and by

that alone, if it is in existence * * *. If the paper is lost * * * it would seem, that regularly the proof of the loss of the paper should first be offered, and that then the witness may be cross-examined as to its contents; after which he may be contradicted by secondary evidence of the contents of the paper. * * *. It follows, from what has just been said, that a witness cannot be asked on cross-examination, whether he has written such a thing, stating its particular nature or purport; *the proper course being to put the writing into his hands*, and to ask him whether it is his writing. * * *."

1 *Greenl. Ev.* (16th Ed.) 463, 464. 465.

In this case this rule was directly violated. In each instance the witness stated that he did not remember having made such a writing, in which statements, without having had the writing in any wise exhibited, he was later contradicted by the witnesses of the plaintiff.

PREJUDICIAL EFFECT OF QUESTION

The prejudicial effect of the questions is readily seen. The witness was called by defendant (P. R. p. 103) to impeach the book, plaintiff's exhibits "A" and "B," which was offered to corroborate plaintiff's theory. By permitting plaintiff to cross-examine the witness on the contents of the alleged

writing, without exhibiting it, the witness was placed in a position where, no matter what his answer, it was probable that the jury would believe that at the time of the transaction to which he had been testifying, he had felt the book was an honest book of entries. This, of course, was further strengthened by later having plaintiff's witness contradict and impeach him as to the writing.

The cross-examination of such a witness certainly could be no more liberal than if he had been a witness called for a party and had been found to be adverse, and then the party calling him had desired to impeach him by evidence of statements made at other times inconsistent with his present testimony. But under such circumstances, before this could be done, the statements must have been related to him with the circumstances of time, place and persons present, or shown to him if in writing.

State v. Steeves, 43 Pac. (Ore) 947, 952.

Little v. Lishkoff, 98 Ala., 321; 12 So. 429.

THIRTY-SIXTH ERROR.

The Thirty-sixth Assignment of Error (P. R. p. 175) relates to the admission of evidence, over defendant's objection, on cross-examination by plaintiff of defendant's witness Jake Saloum, as follows:

"Q. Jake, so you heard about this account for rent for a considerable period before this transaction—I understand you had heard them discuss it before? A. About the account? Q. Yes. A. No, sir. Judge Gunnison:—That is not proper cross-examination. The witness: Not about the account, I heard about partnership. The Court—I think it is cross examination because it relates to the subject of the very entries that are in dispute." (P. R. p. 108.)

CROSS-EXAMINATION WAS NOT CONFINED TO MATTERS BROUGHT OUT IN CHIEF

The witness in his direct examination (P. R. p. 103, 104) had confined his testimony entirely to an impeachment of plaintiff's exhibits "A" and "B." There was not a scintilla of evidence in his direct examination to the effect that he had any knowledge whatsoever as to the controversy between the plaintiff or her husband and the defendant. The question propounded him was not callated to explain, modify, rebut, impeach, or in any wise quality his direct examination as to the making of the book, but was unquestionably purposed to place before the jury the very fact that the witnesses knew about the controversy itself and its inherent facts; thus, affording a peg upon which could be hung, in the juror's minds, an inference that the plaintiff's story was true because a year

before the trial the defendant's witness Saloum had heard it discussed.

CROSS-EXAMINATION SHOULD BE CONFINED TO MATTERS BROUGHT OUT IN CHIEF

"The general rule is that the cross-examination should be confined to matters which have been brought out on the direct examination."

40 CYC. 2501, and cases cited.

Hilderbrand v. United Artisans, 91 Pac. (Ore) 542, 544.

Cheneworth v. So. Pac. Co., 53 Ore. 111 99 Pac. 86, 91.

Morse v. O'Dell, 89 Pac. 139, 141; 49 Ore. 118.

Duntley v. Inman, 42 Ore. 334; 70 Pac. 529.

Simmons v. Ry. Co., 41 Ore. 151; 69 Pac. 1022, 1024.

Oldenbury v. Oregon Sugar Co., 39 Ore. 364; 65 Pac. 869, 871.

Sebreger v. Turner Flouring Mills Co. 43 Pac. (Ore). 719, 723;

State v. Savage, 60 Pac. (Ore) 610, 615.

"This rule is supported by the great preponderance of American authority."

10 M. A. L. 399.

"While the right to cross-examine a witness is a valuable one and should not be unnecessarily restricted, yet it must be limited to matters stated by the witness on his direct examination or be connected therewith."

Goltra v. Penland, 45 Ore. 254; 77 Pac. 129, 131.

And while the adverse party may cross-examine the witness as to any matters stated in his direct examination, or connected therewith (Sec. 1498 C. L. A. supra), at the same time a party has no right to cross-examine a witness except as to facts or circumstances so stated on his direct examination, or connected therewith, and cannot cross examine the witness with regard to that which does not tend to impeach, rebut, explain, modify, or in some way qualify something he has testified to on his examination in chief.

Goltra v. Penland, supra.

"The general rule of practice in the Federal courts limiting cross-examination to the matters embraced in the examination in chief, subject to certain well known exceptions, is settled."

Hales v. R. Co., 200 Fed. 533, 539 (C. C. A. 6th Cir.)

McKnight v. U. S., 122 Fed. 926, 928 (C. C. A. 6th Cir.)

Ill. Cen. R. Co. v. Nelson, 212 Fed. 69, 74.

The only exceptions are to show bias or prejudice or to lay a foundation to admit evidence of prior contradictory statements. It needs no argument to disclose that the question clearly was not conducive to show that the witness had any bias or prejudice, and, the want of anything in the record to show any prior contradictory statements shows it was not asked for that purpose.

Ill. Cent. Ry. Co. v. Nelson, supra

"Witnesses should not be cross-examined on the assumption that they have testified to facts touching which they have given no evidence."

State v. Labuzan, 37 La. Ann. 49.

State v. Curran, 51 Io. 112; 49 N. W. 1006.

FORTY-SIXTH ERROR.

The Forty-sixth Assignment of Error (P. R. p. 177) relates to the admission of evidence, i. e., the refusal to sustain the objection interposed on the ground that it was incompetent, irrelevant and immaterial, to the question propounded the plaintiff, testifying in her own behalf, in direct examination on rebuttal, as follows:

"Q. When George Meyers asked Jake Saloum to write this out at that time, what did he say he wanted it for?" (P. R. p. 133.)

QUESTION ELICITED SELF-SERVING, HEARSAY STATEMENTS

The question sought to elicit what George Meyers, plaintiff's assignor and husband (P. R. p. 2, 3), a witness in the case (P. R. p. 37, 117), had told the defendant's witness Jake Saloum (P. R. p. 103) who contended the book, plaintiff's exhibits "A" and "B", was false and dishonest (P. R. p. 103); and was directly calculated to bring out hearsay evidence. The witness Saloum had been on the stand previously, and could have been impeached upon proper foundation laid at that time. It is true that he was interrogated, over objection of defendant, which objections are discussed herein under Assignment of Error No. 35 and 37, as to a purported writing. However the record, (testimony of Jake Saloum) is bare of any foundation being laid for an impeaching question bearing on the same subject matter as the question now under discussion.

The witness answered "because it is in my language and he made it in English to explain to you (*referring to plaintiff's counsel who propounded the question*), because George cannot explain it to you in my language" and also made the further explanation that "George Meyers stated that the reason he wanted it translated into English was so that he could give it to Mr. Cheney, his lawyer." (P. R. p. 133.)

HEARSAY STATEMENTS ARE NOT LOGICAL PROOF

The answers produced by the question were permitted to go to the jury as illogical proof not only of the statement, but of the existence of the writing concerning which Jake Saloum had been interrogated, over objection, as discussed in said assignments of Error Nos. 35 and 37 herein.

> "Prominent among logical inferences which the law of evidence rejects is that a fact exists because a person not called as a witness has stated its existence."
>
> 16 CYC. 1192, and cases cited.
>
> *Haase v. O. R. & N. Co.*, 24 Pac. 238.
>
> *Donnelly v. U. S.* 228 U. S. 243, 57 L. ed. 820, 833.

SELF-SERVING STATEMENTS ARE NOT ADMISSIBLE

Furthermore the answer sought to, and did elicit an answer directly in plaintiff's favor by the production of a self-favoring statement made by her privy, implying that before the suit was brought and at a time when, so far as the jury was advised, no suit was contemplated, the privy had made a certain statement which indicated that at that time he claimed to have a just claim against the defendant and wanted to submit it to an attorney for the purpose of bringing suit.

"It is a general rule of broad application that the declarations of a party in his own favor are not admissible in his behalf."

Jones Comm. Ev. Vol. 1, 2., Sec 235a, 236, p. 352.

"A party's own statements, oral or written, a fortiori, those distinctly self-serving, although the declarant was disinterested at the time of making his statements, are irrelevant when offered in favor of the declarant; and they are not rendered admissible by being part of a conversation or correspondence with the declarant's witness, or with one sent by the opposite party, or with the adverse party or his agent, or by being brought to the attention of the other party or his agent and commented upon by him, or by being entered upon a book of account or other record, or brought out on cross-examination. * * * Such declarations are equally irrelevant when offered by the declarant's representatives. The rule of exclusion also applies when such declarations are offered in evidence by third persons on their own behalf. A principal cannot offer the unsworn statement of an agent made in his favor."

16 CYC. 1202, 1203, 1204, 1205, and cases cited.

Jones v. Curran, 11 Ore. 280; 3 Pac. 685.

Corbett v. Weaver, 109 Pac. (Wash.) 803.

Bollinger v. Wright, 76 Pac. (Cal.) 1109, 1110.

Oil Co. v. Newlove, 76 Pac. (Cal.) 543

FORTY-EIGHTH AND FORTY-NINTH ERRORS

The Forty-eighth and Forty-ninth Assignments of Error (P. R. p. 177) are herein discussed together, inasmuch as Error No. 48, relating to the receiving and filing of the verdict (P. R. p. 10), is inherently included within Error No. 49, relating to denial of motion for new trial, and can be discussed with it without repetition.

STATUTORY GROUNDS FOR NEW TRIAL

The Statute of Alaska provides that:

"The former verdict or other decision may be set aside and a new trial granted, on the motion of the party aggrieved, for any of the following causes materially affecting the substantial rights of such party.

"First. Irregularity in the proceedings of the court, jury, or adverse party, or any order of the court, or abuse of discretion by which such party was prevented from having a fair trial.

"Second. Misconduct of the jury or prevailing party;

"Third. Accident or surprise which ordinary prudence could not have guarded against;

"Fourth. Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;

"Fifth. Excessive damages, appearing to have been given under the influence of passion or prejudice;

"Sixth. Insufficiency of the evidence to justify the verdict or other decision, or that it is again law;

"Seventh. Error in law occurring at the trial and excepted to by the party making the application." Sec. 1058, C. L. A.

VERDICT NOT SUPPORTED BY EVIDENCE

a. PLAINTIFF'S SECOND CAUSE OF ACTION

GENERAL RULE THAT FAILURE OR INSUFFICIENCY OF EVIDENCE IS GROUND FOR NEW TRIAL

"It is ground for a new trial that there was a total failure of evidence to support the verdict or a failure of evidence as to some material facts necessary to support the verdict, or that the evidence received to prove a fact

essential to support the verdict was insufficient in law."

29 CYC. 832, 833, and cases cited.

Clinch v. Canova, 15 So. 427, 429.

O. & M. R. Co. v. McDaneld, 31 N. E. 836.

Brown v. Hickie, 27 N. W. 276, 278.

Schrader v. Hoover, 54 N. W. 463, 464.

Gano v. Prindle, 50 Pac. 110, 112.

Wendt v. Reimer, 58 Pac. 1003, 1004.

Pecos etc. R. Co. v. Welshimer, 170 S. W. 263, 265.

Prinz v. Western Un. Tel. Co. 105 Pac. 449, 451.

Cunningham v. Warren Bros., 94 Atl. 427.

EVIDENCE DISCLOSES TOTAL FAILURE OF PROOF TO SUPPORT PLAINTIFF'S SECOND CAUSE OF ACTION

Applying this measure, which we think must be conceded to be a correct rule of law, to the record, it readily discloses that plaintiff's proof does not measure up to the verdict.

The plaintiff in her second cause of action alleged that on December 21, 1911, it was agreed and ascertained by and between George Meyers and defendant, that defendant's portion of the rental for said building amounted to the sum of $390.00; and that defendant at said time promised and

agreed to pay said amount as his share of the rental of said store (P. R. p. 3.)

Plaintiff's theory was that she had thus pleaded a stated account. This is indicated by the court's statement: "He is suing for an agreed sum." (P. R. p. 55). However, the testimony on behalf of plaintiff as to any stated account consists of the plaintiff's own statement that the defendant promised to pay her husband the rent, but she did not mention in what amount (P. R. p. 32); and her husband, George Meyers' testimony that "I received the rent for two or three months from him but after that the store did not pay very well. * * * Mike agreed to pay $15.00 a month for his share of the store building. Mike paid me $45.00 for rent and after that I had to wait as there was no money left. I entered that in the book at the time he paid me. I write it in the book. * * * I marked on the second page of the book when Mike paid me the $45.00 for rent. I have had this book (referring to plaintiff's exhibit "A" and "B") seven or eight years. The three entries on page 2 (exhibit "B") are $15.00 each. Mike had never paid me only $45.00 for rent." (P. R. p. 49), and that "We dissolved partnership on December 21, 1911, *and at that time Mike owed me* $345.00 * * *. *On December* 21, 1911 *all bills and accounts and all differences were settled between Mike and myself and were all paid,* but the money was not settled. *I have money still coming to me*

for rent, board and work; he had $242.50 *coming to him for this business*" (P. R. p. 51); and the testimony of the witness Louis Saloum who testified that "*they agreed that Mike owed rent for two years and two months at* $15.00 *a month, and that George owed Mike* $242.50" (*P. R. p.* 59). These extracts from the testimony of the plaintiff's witnesses conclusively show that there never could have been a stated account for $390.00 as alleged in her complaint. According to one version of the witness George Meyers (P. R. p. 49) the stated account was $345.00. According to another version of the witness George Meyers (P. R. p. 51) the stated account was the difference between $345.00 and $242.50, or $102.50. According to the version of the witness Louis Saloum, the stated account was the difference between $390.00, (two years and two months at $15.00 a month) and $242.50, or $147.50. (P. R. p. 59.) This being so, by what stretch of the imagination can it be asserted that she proved her claim against the defendant for $390.00. Certainly, neither $345.00, nor $147.50 nor $102.50 is the amount which she claimed in her pleading. A stated account isn't a shifting, wavering, doubtful balance. On the contrary it is a certain amount, *a definite balance.*

> "An account stated is an agreement between persons who have had previous transactions, fixing the amount due in respect of such transactions. * * *.

"In general terms, where an account is rendered by one person to another, showing a balance due from the one to the other, and the indebtedness thus expressed is acknowledged to be due by the persons against whom the balance appears, or where parties having previous transactions agree upon a definite balance as due from one to the other, this will constitute an account stated."

1 CYC. 364, and cases cited.

" * * *, to constitute an account stated it must appear that the plaintiff and defendant accounted together in their mutual demands, or of the demands of the plaintiff against the defendant, and upon the account there was found due to the plaintiff from the defendant the amount claimed."

Truman v. Owen, 21 Pac. (Ore.) 655 667.

Plaintiff's proof plainly doesn't accord with her pleading. Suppose instead of a stated account her allegation had been that defendant made a note payable to the order of her husband. Proof of a note made to the order of blank would not have supported her allegation. Yet the note would be there. So, in this case the stated account is not one which supports the pleadings.

Thompson v. Rathbun, 22 Pac. 837, 838.

As said by the court in Ahern v. Oregon Tele-

phone & Telegraph Company, 30 Pac. (Ore.) 403, the code with all its comprehensive liberality will not admit a plaintiff to sue for a horse and recover a cow.

No more so does her proof support her allegation in the case at bar.

The defendant had put in issue all the material allegations of her pleading. Hence, the burden was on plaintiff to prove those allegations as alleged.

> "The defendant (*P. R. p.* 5) denied his assent to the statement of account alleged in the complaint, and the burden was therefore on the plaintiff to prove all of the material allegations of the account stated as alleged."
>
> *First. Nat'l. Bank v. Peck*, 103 N. E. 643.

This burden she met in her proof not by proving the amount claimed in her pleading i. e.; $390.00, but by offering a selection of three sums, namely, either $345.00, $102.50, or $147.50, depending upon the version chosen from the testimony of the witnesses. And she is therefore clearly not entitled to recover on her second cause of action.

> "Where an action is brought upon the account as stated, the stating of the account must be proved as alleged, and there can be no recovery on a quantum meruit unless the pleadings are appropriately amended."

Mattingly v. Shortell, 85 S. W. 215.

"The plaintiff's evidence showed a different amount due from that which she pleaded, and she therefore could not recover on the account stated."

Barker Auto Co. v. Bennett, 106 N. E. 990, 991.

"The cause of action (in a stated account) must be proved as alleged, and if not so proved there will be a variance unless the pleadings are amended."

1 R. C. L. 221, Par. 21.

"Where there is a failure of proof, a new trial must be ordered."

29 CYC. 763, citing Ryan v. Copes, 11 Rich. (S. C.) 217; 73 Am. Dec. 160; Thornton v. Road Co., 24 U. C. Q. B. 335.

The provisions of the Alaska Statute relative to failure of proof are as follows.

"No variance between the allegation in a pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it shall be alleged that a party has been so misled, the fact shall be proved to the satisfaction of the court, and in what respect he

has been misled; and thereupon the court may order the pleading to be amended upon such terms as shall be just." Sec. 919, C. L. A.

"When the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs." Sec. 920, C. L. A.

"When, however, the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within the last two sections, but a failure of proof." Sec. 921, C. L. A.

Plaintiff failed to prove her allegation of a stated account in its entire scope and meaning; because as stated she failed to prove the very gist of the stated account, namely, the definite balance; and we therefore believe it must be conceded that there was a failure of proof as to her second cause of action.

Stokes v. Brown, 26 Pac. 561, 562.
Ahern v. Ore. Tel. & Telg. Co., supra.
Thompson v. Rathbun, supra.
Pearce v. Buell, 29 Pac. 78.
Kincaid v. O. S. L. R. Co., 29 Pac. 3.

b. PLAINTIFF'S FIRST CAUSE OF ACTION GENERAL RULE THAT VERDICT CONTRARY TO OR AGAINST WEIGHT OF EVIDENCE IS GROUND FOR NEW TRIAL

"Generally speaking it is ground for new trial that the verdict is contrary to the evidence, or to the weight of the evidence. This statement may perhaps be somewhat too general. A more accurate statement deduced from the language of various courts is that a new trial will be granted where the verdict is plainly, manifestly, palpably, clearly, decidedly, or strongly against the evidence or the weight of evidence. Where the verdict is so strongly against the weight of evidence as to * * * indicate that the jury were influenced by passion, prejudice, or other improper motive, a new trial will presumably be granted in any jurisdiction."

29 CYC. 820, 821, 822, 823, 824, and cases cited.

Burke v. Wood, 162 Fed. 533, 541.

Collins v. Wilcox, 11 S. E. 142, 143.

Clark v. Jenkins, 38 N. E. 974, 975.

Tacoma v. Tacoma etc. Co., 47 Pac. 738, 746, 747.

Jones v. Smith, 158 Fed. 911.

McCoy v. Meodor, 78 S. E. 848.

Horsely v. Weaver, 78 S. E. 260, 263.

Louisville etc. R. Co. v. Henderson, 79 S. E. 556, 557.
Richardson v. Mallory, 79 S. E. 362;
Wardlaw v. Frederick, 79 S. E. 523;
Faulkner v. Hall, 150 S. W. 506, 507;
Iba v. Chicago, etc. R. Co., 157 S. W. 675, 678 et seq.
James v. Hood, 142 Pac. 162, 164.
Clark v. Georgia etc. Works, 79 S. E. 1131.

EVIDENCE DISCLOSES THAT VERDICT IS CONTRARY TO AND AGAINST WEIGHT OF EVIDENCE, AND THAT JURY PLAINLY MUST HAVE CAPRICIOUSLY AND ARBITRARILY DISREGARDED UNCONTRADICTED AND UNIMPEACHED EVIDENCE

The plaintiff to prove her first cause of action called the following witness: Herself, an intersted party, her husband, George Meyers, who was also her assignor on her second cause of action; and Louis Saloum, her brother-in-law by marriage (P. R. p. 60), and a witness who at the time of the trial had a suit pending against the defendant (P. R. p. 60). The defendant to disprove plaintiff's first cause of action called the following witnesses; himself, an interested party; George

Maloff, a man who had lived and worked for the defendant and who had previously been a witness for the defendant in another case; Joe Witsell, Mary Martin and Sarah Johnson who were not in any wise discredited or impeached nor contradicted on this point. The plaintiff and her husband were the only two witnesses who testified directly to plaintiff's first cause of action. The witness Louis Saloum did not testify to it, except while testifying in relation to the purported settlement, he stated that there was left "work and board for Mrs. Meyers, $15.00 a month." (P. R. p. 59.)

The first cause of action was composed of a set of facts which under ordinary circumstances of life are exceedingly humble, private, secluded, and, therefore, difficult to disprove. None of the witnesses testified that the plaintiff ran a boarding house. There was no evidence that plaintiff had any other boarders. The defendant was alone; his wife was dead at the time and his children were in Pawtucket (P. R. p. 49). He could therefore only disprove the testimony of plaintiff and her husband by himself and other casual observers of his acts. Plaintiff did not call her children to corroborate the story of herself and husband; and the record is bare of her calling any persons, neighbors, boarders, or others in corroboration. On the contrary the defendant called the uncontradicted, unimpeached and non-discredited witnesses Mary Martin, Sarah Johnson and Joe Witsell, as well

as his friend George Maloff, to prove the small, ordinary, commonplace things of life, which are so uneventful that no record is kept of them, to show that during the same period referred to by the plaintiff and her husband the defendant had been doing his own cooking and had been eating his meals in a room off the store and that some of these witnesses had been doing his laundry work. As stated, this evidence was not contradicted, except of course by plaintiff's general statement, nor were the witnesses who gave it discredited and it was peculiarly probable and consistent because of its very lack of attempt at defiteness. It would have been far more improbable had these witnesses contended that they could remember a certain day and time on which they had seen the defendant do such a simple thing as eating and could remember it over a lapse of several years.

The record, therefore, shows as to the witnesses in the case: The plaintiff and defendant offset against each other; on behalf of plaintiff the witness George Meyers, the husband and assignor of plaintiff, who, although at the trial claiming that the defendant still owed him money, *had sworn under oath some three years prior to the trial* that "All the bills, accounts, choses in action, and any and all differences between defendant (George Meyers) and plaintiff, (Michael George) were taken into consideration, and were fully settled, paid and satisfied and formed the basis of such dissolu-

tion of said partnership between said plaintiff and defendant; and any and all claims which either party, the plaintiff (Mike George) or defendant (George Meyers) may have had against the other, were fully settled, paid and satisfied in full by reason of said absolute dissolution of said partnership" (Defendant's exhibit No. 3 P. R. p. 114, 115); and the witness Louis Saloum, brother-in-law of the plaintiff's husband, and a litigant against the defendant at the time of the suit; and on behalf of defendant, his friend George Maloff; and the three unimpeached, uncontradicted and *non*discredited witnesses, Mary Martin, Sarah Johnson and Joe Witsell.

There is nothing in the record to indicate that defendant's witnesses were any less credible than the plaintiffs. The five witnesses for defendant diametrically opposed the plaintiff's witnesses.

> "While the weight of testimony does not necessarily depend upon the number of witnesses, yet where the witnesses are of equal credibility it may undoubtedly be increased by the number of witnesses. * * *. The court was specifically asked to set aside the verdict on the ground that it is contrary to the weight and the preponderance of the evidence. Under the circumstances of this case, we think this motion should have been granted, and that it was an absence of discretion not to grant the same."

McCoy v. Mil. Ry. Co., 52 N. W. 93, 94, 95.

In this connection it is illuminating to compare the consistency and probability of the testimony of the witnesses Witsell, Martin and Johnson with the improbable and inconsistent tesimony of the plaintiff and her husband and her witness Louis Saloum as to her first cause of action. In her pleadings she contends that the defendant owes her $345.00 for performing certain domestic services for him. No where in her testimony does she state how much it amounted to, although she admitted payment of $72.50. In her reply (P. R. p. 8) she says that *defendant at her special instance and request, advanced and loaned her* $200.00 *on or about the 20th day of January*, 1915, *and that she repaid it on April* 12, 1915. However, in her testimony she said; "Mike paid me some, about $72.50, and I got it marked down in the book. My husband marked it in the book at the time I got the money. I told him to put it in the book. Since then I asked him three or four times, and he say, 'I ain't got much money.' * * * I didn't say anything to Mike about this last spring on April 12th. I never speak to Mike, and *I didn't borrow* $200.00 *last spring from Mike.* I don't know who did borrow the $200.00. *I didn't swear in my reply that I borrowed* $200.00. I never asked Mike for the money at all after I come back, but I think my husband asked him, and I never asked Mike for

money on April 12, 1915." (P. R. p. 34.) Her testimony thus was in direct contradiction to her reply. George Meyers, her husband, testified "*I borrowed the* $200.00 *from him*" (referring to the defendant.) (P. R. p. 55.) On rebuttal plaintiff contradicted herself and testified that *she was the one who borrowed the* $200.00 (P. R. p. 129). On rebuttal the witness George Meyers testified that the plaintiff, his wife, was present at the time of the loaning of the $200.00, and that he, George Meyers, endorsed the check over to her (P. R. p. 124) and thus endeavored to contradict himself and show that his wife borrowed the $200.00. Defendant's witness Hubbard stated that the defendant gave the witness George Meyers the $200.00; that George Meyers alone signed the note; and that George Meyers endorsed the check over to plaintiff in the presence of defendant. (P. R. p. 102.) The defendant's contention was that he loaned $200.00 to the witness George Meyers, (P. R. p. 72.) There is no question that the $200.00 was repaid, and plaintiff said in her reply that it was repaid on April 12, 1915. Yet on April 9, 1915, three days before she contends it was paid, through her attorney Cobb, she wrote a letter to the defendant demanding payment on her first cause of action (Defendant's Exhibit No. 2, P. R. p. 83). It seems highly improbable that she would repay $200.00 at a time when she had threatened suit against the defendant to recover $390.00. On the other hand,

if ever since December 21, 1911, defendant had owed George Meyers $345.00 why would George Meyers swear on December 22, 1912, that *any and all differences* between himself and the defendant had been fully settled, paid and satisfied (defendant's exhibit No. 3, P. R. p. 114, 115); and why did he not off-set the $345.00 against the $242.50 which he says he paid the defendant about a year after December 21, 1911, (P. R. p. 55); and why did he not off-set the $345.00 against the $200.00 which he says he borrowed in January, 1915, from the defendant and repaid to him before the suit was brought in May, 1915. (P. R. p. 55); and why would he on April 12, 1915, pay back the $200.00 to defendant three days after his wife had made a demand upon defendant for payment of the first cause of action and within thirty-three days of the time that the suit was filed (P. R. p. 5), and within less than a month of the time that he afterwards claimed to have made the assignment to his wife on which she brought her second cause of action. These transactions are all exceedingly improbable taking either contention of plaintiff and her husband. Certainly if defendant owed either of them money they failed to act like ordinary persons would act under similar circumstances. There is nothing in the record to show that two sums, each amounting to $200.00, were repaid. If plaintiff borrowed the money it was strange that she would repay it three days after she had made

a demand on defendant and threatened him with a suit for $390.00. If plaintiff's husband borrowed it, it was strange that he would repay it, without suit, in the face of his contention that the defendant had owed him $345.00 since December 21, 1911. So far as the domestic services claimed to have been performed by plaintiff for defendant are concerned, plaintiff's theory is, as a matter of fact, supported only by herself. The witness George Meyers was not in position to testify except as to sporodic periods, for as plaintiff says, "My husband was down in Seattle * * * some time my husband was down below." (P. R. p. 30, 31). Her husband, George Meyers, also testified that he was away part of the time. (P. R. p. 48.) Plaintiff's witness Louis Saloum did not testify as to plaintiff's first cause of action except to say that at the time of the alleged settlement, referring to the defendant and George Meyers, "they said some rent for Meyers and some work for Mrs. Meyers." (P. R. p. 58.) Yet, the witness, according to his own statements, although he had done the figuring for defendant and Meyers in arriving at their alleged stated account (P. R. p. 60), and knew that the defendant owed Meyers $390.00 (P. R. p. 59), on the occasion of a former suit had testified "at that time I testified that all that was owing between these parties was that George Meyers owed Mike George $242.50" (P. R. p. 610.) and said nothing about the defendant owing Meyers $345.00 (P.

P. p. 63.) presumably because "nobody asked me about that." (P. R. p. 61) What kind of a man is this, who would sit idly by and say that Meyers owed the defendant $242.50 and merely because he was not asked, say nothing about the fact that he knew that the defendant owed Meyers $390.00, and thus permit Meyers, his brother-in-law, to be obliged to pay the $242.50 to keep his store from being closed by attachment. (Ev. George Meyers, P. R. p. 55.)

It is also enlightening to examine the record as to defendant's loans of $150.00 and $175.00 to the plaintiff. Defendant (P. R. p. 68, 71) and the witness George Maloof (P. R. p. 86, 87, 88) both testified directly to the fact that these loans were made. Their story as to the loan of $175.00 was circumstantially corroborated by the witness Fannie Williams (P. R. p. 98) who was unimpeached, uncontradicted and not discredited. The witness Maloof's testimony as to the loan of $150.00 was also circumstantially corroborated by the unimpeached and *non*discredited witness Bothwell (P. R. p. 99). In fact Bothwell's testimony is corroborated by plaintiff (P. R. p. 130), except she denies that there was anything said about the money being tied in a handkerchief. There was no attempt to show that Bothwell had any interest in the case. We submit that his story is more credible than an interested party—the plaintiff. Furthermore, if plaintiff had received $150.00 from

her husband to put in the bank (P. R. p. 130) in accordance with their general custom (P. R. p. 131) why did not her husband on rebuttal corroborate her story.

Inasmuch as plaintiff in no wise attempted to explain away the testimony of the witnesses Witsell, Martin, Johnson, Bothwell, and Williams, and as these witnesses were unimpeached and not discredited and were not even contradicted, except Bothwell by plaintiff as to the money being tied in the handkerchief, and Martin and Johnson by plaintiff that they had done defendant's washing after the dissolution of partnership (Ev. plaintiff P. R. p. 134) at which time the defendant had moved to a separate house from plaintiff and her husband (Ev. Meyers P. R. p. 49, 50) two blocks away (P. R. p. 60, Ev. Louis Saloum), it is evident that the jury must have capriciously and arbitrarily disregarded all of these witnesses and their testimony in order to reach their verdict.

> "A verdict rendered contrary to, or in disregard of, evidence which was not improbable or inconsistent and was not contradicted or discredited will be set aside."
>
> 29 CYC. 830, and cases cited.
>
> *Kelly v. Morris*, 6 Pet. 622; 8 L. Ed. 523.
>
> *Boe v. Lynch*, 49 Pac. 381.
>
> *Chicago, etc. Ry. Co. v. Landauer*, 54 N. W. 976, 980.

Wallace v. Weaver, 133 Pac. 1099.
Coffman v. Viquesney, 84 S. E. 1069.
Rankin v. Thompson, 3 Pac. 719, 721.
Alabama etc. R. Co. v. Scruggs, 45 S. E. 689.
Central etc. R. Co. v. Mote, 48 S. E. 136.
Sleeper v. Des Moines, 93 N. W. 585.
Algeo v. Duncan, 39 N. Y. 313, 315, 316.
Hileman v. Maxwell, 149 N. W. 44.

"If, * * * the conclusion of the jury appears to have been arbitrary or capricious, or the jury plainly disregarded the uncontradicted testimony of a witness who was not impeached or discredited ,even though he was a party to the actions, a new trial will be granted."

39 CYC. 830, 831, and cases cited.
Mullen v. Butte, 95 Pac. 579, 599.
Wallace v. Weaver, 133 Pac. 1099, supra;
Gunn v. Union R. Co., 48 Atl. 1045.
Lee v. Chicago, etc. R. Co., 77 N. W. 714, 717.
Lincoln v. Stowell, 72 Ill. 84, 86.
Chicago et. R. Co. v. Stumps, 55 Ill. 367, 69 Ill. 409, 411.
Chavias v. Dry Dock etc. Co. 70 N. Y. Sup. 1014.

Cunningham v. Gans, 29 N. Y. Sup. 979, 980.

Sweaney v. Bledsoe, 27 Tenn. 487, 489.

MOTION FOR NEW TRIAL

a. AFFIDAVITS IN SUPPORT THEREOF NEWLY DISCOVERED EVIDENCE IS GROUND FOR NEW TRIAL

"Newly discovered evidence, material for the party applying which he could not with reasonable diligence have discovered and produced at the trial, is ground for a new trial."

29 CYC. 881, and cases cited.

Blewitt v. Miller, 63 Pac. 157.

Kenezleber v. Wahl, 28 Pac. 225, 226.

Heinz v. Cooper, 38 Pac. 511, 511.

People v. Corty, 3 Pac. 608.

Wells etc. Co. v. Gunn, 79 Pac. 1029, 1030.

Harrell v. Gregory, 14 S. E. 186.

Atlantic etc. Ry. Co. v. Beauchamp, 19 S. E. 24, 26.

Florida etc. Co. v. Grant, 35 S. E. 271.

Oldfather v. Zent 41 N. E. 555, 556.

Roeser v. Pease, 131 Pac. 534, 535.

Marshall v. Barry, 142 Pac. 199, 200.

Jaquist v. Kelly, 151 N. Y. S. 187, 191.

Mason et al v. Meloan, 177 S. W. 435, 438.

EVIDENCE OFFERED IN AFFIDAVITS WAS NEWLY DISCOVERED, MATERIAL, NON CUMULATIVE, AND COULD NOT, WITH DILIGENCE, HAVE BEEN PRODUCED AT TRIAL

The defendant in support of his motion for a new trial filed affidavits of Julius A. Johnson (P. R. p. 152), Gustav A. Messerschmidt (P. R. p. 158), and Andrew Martin (P. R. p. 159). The facts which these affiants swore that they would testify to were material to the defense. Plaintiff's first cause of action consisted of a claim for domestic services and board and room, knowledge of which in the ordinary course of human events would be confined to the breasts of those constituting the family circle. The defendant was alone at the time and was not married nor did he have any family in Douglas. (Testimony of plaintiff, P. R. p. 630). The only proof, by which he could corroborate his denial of plaintiff's contention, would be by that of neighbors and visitors. Of course the best proof would undoubtedly be to bring in at least one witness for each day, in consecutive order, of each of the twenty-six months over which the plaintiff contended the services ran. Thus approximately 790 witnesses would have been the best possible corroboration of his denial. However, it is practically impossible and altogether improbable that any man would keep such a minute rec-

ord of the common place affairs of his life as to be able to do this. He therefore did the next best thing. He denied the story himself (testimony of Mike George); he called the unimpeached and uncontradicted witness Witsell to testify that he saw the defendant do cooking in the room right off the store in 1910 (P. R. p. 85); he called his friend Maloff who said that the defendant used to eat in his room and that the plaintiff and her husband ate across the street, and that he never saw the plaintiff do any cooking or washing for the defendant and never saw her in the defendant's room (P. R. p. 85); he called the uncontradicted and undiscredited witness Mary Martin who said that the defendant had a cook stove and some dishes in his room and that some times he requested her to have a cup of coffee with him. (P. R. p. 93), and the unimpeached and undiscredited witness Sarah Johnson that she did the defendant's laundry work (P. R. p. 96, 97.) The affiant Messerschmidt swore that he would testify that on at least three or four occasions he had seen the defendant preparing, cooking and eating meals in the room off the store in which the defendant lived (P. R. p. 158); the affiant Andrew Martin swore that he would testify that on several occasions he had seen the defendant while the latter was eating in the room off the store in which the defendant lived, and that during the time covered by plaintiff's pleading affiant had eaten five or six meals

with the witness Meyers in the latter's residence and that the defendant was not present on any of those occasions (P. R. p. 160); and the affiant Johnson swore that he would testify that during the time Meyers and the defendant were in partnership, that affiant had placed and built a concrete chimney in the room off of said store, in which defendant was then living; that affiant was in said room on numerous occasions; that there was a small cooking range in said room; that he saw defendant preparing, eating and cooking meals and food in said room on several occasions; that affiant on one occasion saw the defendant buying meat in the butcher shop and that affiant himself on one occasion purchased meat for the defendant, and that affiant would corroborate the witness Sarah Johnson that she did washing for the defendant for a period of something over two years (P. R. p. 155). These facts are of course all small and uneventful, but highly consequential and important. While they all bear on the fact at issue, to-wit: that plaintiff did not perform services for defendant, yet they in themselves are each distinctly separate probative facts. These affiants are three more of the 790 witnesses required by defendant to prove the common place events of his life for each day of the 26 months. There is nothing in any of their affidavits to show that any of the occasions to which they refer were the same occasions as those testified to by plaintiff's

witnesses at the trial. While it is true that they all go to support the same issue, namely, that defendant's denial of plaintiff's contention is true, yet they are distinctly probative facts readily separable and plainly different, and, this being so, they were not cumulative.

> "The generally recognized rule is that evidence of a distinct probative fact is not cumulative to evidence of another fact, although both facts support the same issue."
>
> 29 CYC. 908, and cases cited.

It is fair to assume that they ought to produce opposite results on another trial, because all the affiants are citizens of the United States, and are of European extraction, as distinguished from the witnesses at the trial, all of whom were either Assyrians or Indians, except the witness Bothwell, Hubbard and Witsell, and of the last three named only Witsell testified on the issue of which the affiants state they will testify. The evidence was discovered after the trial, and due diligence was used to procure it. (Affidavits of Robertson, p. 147, 151). There are no contradictory affidavits. It therefore follows that a new trial should have been allowed.

> "A motion for a new trial on the ground of newly discovered evidence should be allowed where the evidence was in fact discovered after the former trial, due diligence was used to procure it, the evidence is material to

the issue, is not cumulative and ought to produce on another trial an opposite result."

Hotchkiss v. Patterson, 48 Pac. 435.

b. ERRORS AND MISCONDUCT ERRORS IN LAW OCCURRING AT TRIAL AND EXCEPTED TO IS GROUND FOR NEW TRIAL

"A new trial should be granted for the erroneous admission of evidence which is incompetent, or otherwise inadmissible, and which may have influenced the jury in arriving at its verdict. The improper admission of the testimony of an incompetent witness, or the admission of secondary evidence without proper foundation, is ground for a new trial."

29 CYC. 779, 789, and cases cited.

Under this rule we call attention to the various errors committed in the admissions and the exclusions of evidence, as set forth in the various Assignments hereinbefore discussed. It would seem needless repetition to re-state them here, but we urgently insist that these errors were so prejudicial that a new trial should be granted. We realize that no man can say just what the effect of the errors was. No man would attempt it except a clairvoyant or soothsayer. As the court said, in Snider v. Power Co., 120 Pac. 88, 91, in referring to alleged errors arising out of misconduct at the

trial "Of course no man can say just what the effect of the misconduct was" and in which case the court approvingly quoted the statement of that learned jurist Justice Brewer, to-wit:

> "All that can safely be laid down is that wherever in the exercise of a sound discretion it apepars to the court that a jury may have been influenced as to their verdict by such intrinsic matters, however thoughtlessly or innocently uttered, or that the statements were made by counsel in a conscious and defiant disregard of his duty, then the verdict should be set aside."
>
> *Winter v. Sass*, 195 Kan. 556, 566.

IRREGULARITIES AND MISCONDUCT EFFECTING VERDICT

And in connection with the statement of Justice Brewer just cited we call attention to the first and second paragraphs of Sec. 1058, C. L. A., supra, wherein irregularity and misconduct are made grounds for new trial. It is not for us to determine whether plaintiff's counsel's objectionable questions were uttered innocently and thoughtlessly, or intentionally and wilfully. However questions were put not once or twice, but many times, in such form throughout the trial that, considering the character of the witnesses, they could lead only to the creation of prejudice in the jury's minds.

Attention is called to the question put the defendant relative to the loss of the life of the plaintiff's two children by fire (P. R. p. 70, 71). A fact entirely immaterial to the case and which questions the plaintiff, being a woman, could certainly not have operated against her cause.

Attention is called to the question propounded the defendant as to whether or not he wished to answer the question fairly (P. R. p. 78). There is nothing whatever in the record to show that the witness was not answering fairly.

Attention is called to questions propounded the defendant assuming that his pleading stated that he had loaned the plaintiff $200.00; that he uary 20, 1915 and $175.00 on February 1, 1915; that he ha dloaned the plaintiff $200.00; that he was in partnership with George Meyers and his wife (P. R. p. 79, 80). It is true that the court in each instance later corrected these questions, but the damage had already been consummated.

Attention is called to the repeated questions of plaintiff propounded the witness Maloff to another case in which plaintiff's counsel assumed that the defendant in the case at bare was interested. (P. R. p. 87, 88).

ERRORS OCCURRING WERE PREJUDICIAL

The repeated asking of these questions on extraneous matters, even in the face of the court's ruling, seems to us must have created prejudice

in the jury's mind. As stated, if such prejudicial questions had only occurred once or twice, we realize that it might be a serious matter to assume that any prejudice had arisen therefrom. However, when they occurred with such frequency it is impossible to predicate any other conclusion as a result of them than that they had an influence on the minds of the jurors in the reaching of their verdict. And, they having been injected in the trial by plaintiff, we urge that justice requires the granting of a new trial, so that opportunity may be given to try out the merits of the controversy, free from these extraneous, prejudicial matters. Furthermore, plaintiff has little to complain against the granting of a new trial. She did not recover the total amount claimed by her and if her contention be true, a new trial will undoubtedly afford her an opportunity to recover her full claim. On the contrary, defendant, without a new trial, is forever debarred from having a jury pass upon the merits of his claim, free from the extraneous, prejudicial matters which surrounded the trial.

FIFTIETH ERROR

THE FIFTIETH ASSIGNMENT OF ERROR (P. R. p. 177, 178) relates to the making and entering on January 4, 1916, of the judgment (P. R. p. 14, 15, 16) in this action, adjudging that the plaintiff recover from the defendant the

sum of $418.35 with interest at 8% from December 9, 1915, together with her costs and disbursements.

JUDGMENT SHOULD BE REVERSED WHEN TRIAL COURT ERRED IN ITS RULINGS ON MATERIAL POINTS TO THE PREJUDICE OF THE APPELLANT

Conceiving, as we do, that the trial court erred in its rulings on the various material points hereinbefore discussed in the several assignments of error heretofore set out, namely, in the improper admission and exclusion of evidence, and in the improper denial of a new trial, and in the receiving and filing of the verdict, we respectfully urge that the judgment should be reversed on the ground that these errors were on material points, and were prejudicial to the defendant.

3 CYC. 553, and cases cited.

Forrest v. Portland, etc. Co., 129 Pac. 1048, 1050;

Armstrong v. High, 32 S. E. 590;

Clapp v. Engledow, 108 S. W. 462, 464;

Bank v. Gould, 24 S. E. 547, 548;

Maine, etc. Co. v. Boston, etc. Co., 37 Cal. 40, 50.

JUDGMENT WILL BE REVERSED FOR SLIGHT ERRORS WHERE APPELLATE COURT IS NOT SATISFIED WITH ITS JUSTICE

We do not concede that the errors committed by the trial court were slight errors, but on the contrary we firmly believe that an examination of them will diclose that they were made on material and important points, and that by the erroneous rulings substantial prejudice has resulted to the defendant. The errors, are, however, so apparent, and the injustice of the verdict under the circumstances so plainly obvious, that we urge that even were the errors slight a reversal of the judgment should be granted, and a new trial granted defendant so that the merits of the controversy can be tried out free from extraneous, prejudicial matters.

3 CYC. 443, 444, and cases cited.
Tract Co. v. Lloyd, 105 N. E. 159;
Smidt v. Schweitzer, 137 N. Y. S. 807;
Freeman v. Moreman, 146 S. W. 1045;
Savannah etc. R. Co. v. Harrigan, 7 S. E. 280;
Strawbridge v. Vandeburgh, 10 N. Y. S. 610;
Goldstein v. White, 16 N. Y. S. 860.

ERROR IN ADMITTING INCOMPETENT EVIDENCE SHOULD NOT BE DISREGARDED AS HARMLESS

Even conceding for the sake of argument that the evidence is so nearly balanced, that the verdict would not be disturbed on appeal, it cannot be said that the defendant has not been prejudiced by the extraneous matters erroneously admitted.

2 R. C. L. 253.

And this is particularly so, when it is recalled that the incompetent evidence, inasmuch as plaintiff obtained a verdict, may have been the very evidence which led to the jury giving her the verdict.

Zucker v. Whiteridge, 4 L. R. A. (N. S.) 683, 695.

ADMISSION OF IMMATERIAL EVIDENCE, TENDING TO MISLEAD JURY OR IN FLAME THEIR MINDS AGAINST ONE OF THE PARTIES, IS GROUND FOR REVERSAL

The evidence as to the loss of the lives of plaintiff's two children and as to the defendant having interest in another action against the witness George Meyers and his wife, the plaintiff, was entirely immaterial to this case. Its only tendency could have been to mislead the jury and inflame their minds against the defendant. Its immater-

ialty, if it be so conceded for sake of argument, does not therefore obviate its injurious tendency, and its admission is ground for reversal.

38 CYC. 1416, 1417, 1418, and cases cited.

Sterne v. Mariposa Com. Etc. Co., 97 Pac. 66, 67.

Title Ins. & Trust Co. v. Ingersoll, 94 Pac. 94, 97.

Ferguson v. Mines, 93 Pac. 867, 868.

Hardy v. Martin, 89 Pac. 111, 113.

Pyle v. Percy, 55 Pac. 141, 142.

Lissak v. Crocker Est. Co., 51 Pac. 688.

Cincinnati etc. Co. v. Thompson, 102 Pac. 848, 849.

Meek v. Dougherty, 97 Pac. 557, 558.

Klander-Weldon Dyeing Mach. Co. v. Gaynor, 166 Fed. (C. C. A. 2 Cir) 287, 288.

Leedy v. Lehfeldt, 162 Fed. (C. C. A. 9 Cir) 304, 306.

Meeker v. Printing Co., 135 Pac. 457, 459.

De Frutas v. Suisun, 149 Pac. 553, 555.

Hoffman v. So. Pac. Co., 143 Pac. 1032, 1033.

Sc. Am. Bank v. Long, 134 Pac. 913, 914.

Brison v. McKellop, 138 Pac. 154, 156.

Chadwick v. O. W. R. & N. Co., 144 Pac. 1165, 1170.

Shepard v. Denver & R. G., 145 Pac. 269, 300.

Bank v. Roseberry, 148 Pac. 1034, 1037.

McIntosh v. McNair, 99 Pac. 74, 75.

Boise v. A. T. & S. F. R. Co., 51 Pac. 662, 663.

George v. McManus, 150 Pac. 73, 75.

Marsteller v. Leavitt, 62 Pac. 384, 385.

Aldrich v. Col. So. R. Co., 64 Pac. 455, 460.

Sudden & Christenson v. Morse, 92 Pac. 901, 902.

Atchinson etc. R. Co. v. Ringle, 80 Pac. 43.

Denver & R. G. Co. v. Frederic, 140 Pac. 463, 468.

Hoffman v. Watkins, 136 Pac. 664, 665.

EXCLUSION OF COMPETENT MATERIAL EVIDENCE IS REVERSIBLE ERROR

The evidence offered by way of cross-examination of plaintiff relative to the assignment and to the entries in the book were material to the issue, i. e.: both went to issues in the case, the proof of which was necessary under plaintiff's pleadings. In the one instance there could be no better proof of the circumstances of the assignment, than the testimony of one of the parties to it, and plaintiff

was the assignee therein. In the other instance, what better proof could be required than the testimony of the person, namely, plaintiff, on whose behalf, at least part of the book entries had been made, and on whose behalf, as she was the assignee bringing the action, the entire book entries were offered as evidence.

The evidence offered by way of cross-examination of the witness George Meyers also went to the issues of the case, the proof of which was necessary. He had testified that the book was in his writing, and had stated what he claimed was disclosed by the entries on plaintiff's exhibit "B." The book was his making; he brought it into court to support the case of his wife, who was also his assignee. Presumably there could have been no better evidence which could be produced, than to show on cross-examination what the entries actually were.

This evidence was therefore material and competent, and its exclusion is reversible error. Particularly is this so, when it is impossible to say that the jury would have returned the same verdict if it had been admitted.

2 R. C. L. Sec. 207, p. 255, 256.

Gambrill v. State, 17 L. R. A. (N.S.) 291, 292.

"Where the evidence is in direct conflict the exclusion of competent evidence is a matter of much more consequence than it would be where the tes-

timony on the point was substantially all one way."

Chlanda v. St. Louis T. Co., 112 S. W. 249.

"Thus where the evidence is so conflicting that it is doubtful whether plaintiff has sustained his burden of producing a preponderance of evidence almost any error in the exclusion of evidence offered by defendant becomes material."

Fink v. Glanter, 121 N. Y. Sup. 297.

Tulley v. Board, etc. 67 Pac. 346, 347.

Lees v. Potter, 74 Pac. 622.

"The exclusion of proper evidence directly corroborative of the evidence of a party, in conflict with the testimony of the adverse party, is prejudicial."

Hanson v. Kline, 113 N. W. 504.

"Where the evidence consists principally of the testimony of the parties, each in support of his own claim, it is substantial error to exclude any testimony legitimately bearing on the weight to be given to the testimony of the parties."

Broadwell v. Conover, 79 N. E. 402.

Considering that the record discloses on its face many palpable errors, but does not in any wise affirmatively disclose that these errors were not prejudicial, we think that it must be conceded that a presumption of prejudice against the defendant exists from these errors.

3 CYC. 386, and cases cited;

Mexia v. Oliver, 148 U. S. 664; 37 L. ed. 602;

Vicksburg etc. R. Co. v. O'Brien, 119 U. S. 99, 103; 30 L. ed. 299.

And in view of the manifest errors so occurring at the trial to the manifest prejudice of defendant, we urge that the judgment entered by the trial court be reversed and a new trial be granted, and we respectfully pray that it be so ordered.

Respectfully submitted,

GUNNISON & ROBERTSON,

Attorneys for Plaintiff in Error.